No. 02-271-CFX Title: Dow Chemical Company, et al., Petitioners
v.
Daniel Raymond Stephenson, et al.

Docketed: August 22, 2002 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Jul 23 2002	Application (02A79) to extend the time to file a petition for a writ of certiorari from August 6, 2002 to August 20, 2002, submitted to Justice Ginsburg.
	Jul 29 2002	Application (02A79) granted by Justice Ginsburg extending the time to file until August 20, 2002.
	Aug 20 2002	Petition for writ of certiorari filed. (Response due September 21, 2002)
	Sep 23 2002	Motion of Product Liability Advisory Council for leave to file a brief as amicus curiae filed.
	Sep 23 2002	Brief of respondents Daniel Raymond Stephenson, et al. in opposition filed.
	Oct 4 2002	Reply brief of petitioners Dow Chemical Company, et al. filed.
	Oct 9 2002	DISTRIBUTED for Conference of November 1, 2002
	Nov 4 2002	Motion of Product Liability Advisory Council for leave to file a brief as amicus curiae GRANTED. Justice Stevens OUT.
	Nov 4 2002	Petition GRANTED. Justice Stevens OUT. SET FOR ARGUMENT February 26, 2003. **********
	Dec 12 2002	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioners and counsel for the respondents.
	Dec 18 2002	Brief of petitioners Dow Chemical Company, et al. filed.
	Dec 18 2002	Joint appendix filed.
	Dec 19 2002	Brief amicus curiae of Product Liability Advisory Council filed.
	Dec 19 2002	Brief amicus curiae of Washington Legal Foundation filed.
	Dec 19 2002	Brief amici curiae of American Insurance Association, et al. filed.
	Dec 19 2002	Brief amicus curiae of Defense Research Institute filed.
	Jan 10 2003	CIRCULATED.
	Jan 10 2003	Order extending time to file respondents' brief on the merits to and including January 24, 2003.
	Jan 24 2003	Brief of respondents Daniel Stephenson, et al. filed.
	Jan 24 2003	Brief amici curiae of Law Professors, Susan Koniak, et al. filed.
	Jan 24 2003	Brief amicus curiae of Trial Lawyers for Public Justice filed.
	Jan 24 2003	Brief amici curiae of Lymphoma Foundation of America, et al. filed.
	Jan 24 2003	Brief amici curiae of American Legion, et al. filed.
	Jan 24 2003	Brief amici curiae of Louisiana, et al. filed.
	Jan 24 2003	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Jan 24 2003	Brief amicus curiae of Public Citizen filed.

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No. 02-271-CFX

Entry	Date	Proceedings and Orders
	Feb 14 2003	Reply brief of petitioners Dow Chemical Company, et al. filed.
	Feb 26 2003	ARGUED.

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members had a full opportunity to opt out, object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class.

2. Whether, if collateral attack is permissible, the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of events and changes in the law occurring years after the settlement has become final and all of the settlement proceeds have been disbursed.

PARTIES TO THE PROCEEDING

Petitioners:

Dow Chemical Company

Monsanto Company

Hercules Incorporated

Occidental Chemical Corporation

Ultramar Diamond Shamrock Corporation

Chemical Land Holdings, Inc.

Maxus Energy Corporation

Harcros Chemical, Inc.

Thompson-Hayward Chemical Company

T H Agriculture & Nutrition Company, Inc.

C.D.U. Holdings, Inc.

Uniroyal, Inc.

Uniroyal Chemical Company

Respondents:

Daniel Raymond Stephenson

Susan Stephenson

Daniel Anthony Stephenson

Emily Elizabeth Stephenson

Joe Isaacson

Phyllis Lisa Isaacson

CORPORATE DISCLOSURE STATEMENT

Dow Chemical Company, Monsanto Company, and *Hercules Incorporated* have no parent corporations and no publicly held company owns 10 percent or more of their stock.

Occidental Chemical Corporation, the successor by merger to Diamond Shamrock Chemicals Company (which was known prior to September 1, 1983, as Diamond Shamrock Corporation), is an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, a publicly held company.

Ultramar Diamond Shamrock Corporation was acquired in 2001 by Valero Energy Corporation, which has no parent corporation and no publicly-held shareholder with 10 percent or more of its stock.

Maxus Energy Corporation and *Chemical Land Holdings, Inc.*, are indirect, wholly-owned subsidiaries of YPF S.A. ("YPF"). Approximately 98 percent of YPF's stock is owned by Repsol YPF S.A.

Uniroyal, Inc., and *C.D.U. Holdings, Inc.*, are dissolved corporations.

Uniroyal Chemical Co. is wholly-owned by Crompton Corporation, a publicly held company.

T H Agriculture & Nutrition Company, Inc. (now known as T H Agriculture & Nutrition L.L.C.) is a wholly-owned subsidiary of Philips Electronics North America Corporation, which is, in turn, an indirect wholly-owned subsidiary of Koninklijke Philips Electronic N.V.

Thompson-Hayward Chemical Co. no longer exists. The assets of Thompson-Hayward Chemical Co. were purchased by *Harcros Chemical, Inc.*, which has no corporate parent and no publicly-traded shareholder with 10 percent or greater control of its stock.

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IN THE

Supreme Court of the United States

No. 02-

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-20a) is reported at 273 F.3d 249 (2d Cir. 2001). The orders of the district court dismissing respondents' complaints (App., *infra*, 23a-26a) are not reported. The transcript of the oral argument in the district court on petitioners' motion to dismiss has been reproduced as Appendix E to this petition (App., *infra*, 27a-44a).

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2001. Petitioners filed a timely petition for rehearing with a request for rehearing en banc, which the court of appeals denied on May 8, 2002. On July 29, 2002, Justice Ginsburg extended the time for filing a petition for a writ of certiorari until August 20, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Rule 23(e) of the Federal Rules of Civil Procedure provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

INTRODUCTION

This case presents important questions of law that have divided the courts of appeals: (i) whether the doctrine of *res judicata* precludes the successive relitigation, through collateral attack on an otherwise final judgment based on a court-approved settlement, of the question whether the interests of nonnamed class members were adequately represented, and (ii) if not, whether adequacy of representation is properly assessed as of the time the class was certified (subject to review by the certifying court and on appeal following settlement or trial), or later—retrospectively—based on a *post-hoc* assessment of the results ultimately obtained by class members and any intervening changes in the law.

STATEMENT OF THE CASE

1. Beginning in 1978, hundreds of individual lawsuits and class actions were brought on behalf of 2.5 million veterans who served in Vietnam between 1961 and 1972 and their family members against petitioners, the manufacturers of Agent Orange, an herbicide that petitioners supplied to the United States Government in compliance with military specifications for use as a defoliant. The complaints asserted that exposure to Agent Orange had caused or would cause thousands of veterans to suffer a variety of illnesses. The cases were consolidated before then-Chief Judge Weinstein of the United States District Court for the Eastern District of New York, who certified a class of veterans and their families.

As Judge Weinstein and the Court of Appeals for the Second Circuit would later remark, the class members faced numerous obstacles to recovery, several of which appeared (and still appear) almost surely insurmountable. Among those obstacles were (1) the complete absence of competent and admissible evidence that Agent Orange is likely to cause *any* disease—let alone that it actually caused those attributed to it by the class members—and (2) petitioners' entitlement to complete immunity from liability under the military contractor doctrine (which the Second Circuit in fact later held barred the claims of those who opted out of the eventual class settlement). *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Despite the weakness of the class members' claims, in order to bring a consensual end to what had already been years of litigation and achieve final and complete peace with the veteran class, petitioners agreed in May 1984 to pay $180 million to settle the action. As an explicit condition of the offer, petitioners insisted that all class members who had been exposed to Agent Orange—specifically including those whose injuries had not yet manifested—be covered by the settlement and "forever barred" from bringing Agent Orange claims against them. Following eleven days of fairness hear-

ings around the country, Judge Weinstein concluded that the lump-sum settlement offered by petitioners was the best (and, indeed, only) way to achieve any benefits for the class members; accordingly he approved the settlement as fair, reasonable, and adequate under Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 155-56. As the court of appeals later observed, the settlement was a highly favorable one for the class members, in view of their "dim prospects" for any recovery following a trial.[1] *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994).

As for the allocation of settlement funds, Judge Weinstein concluded that in view of the lack of evidence that Agent Orange had caused any class member to sustain any illness, there was no logical way to distribute funds based on the strength or weakness of class members' individual claims or based on categories (or subclasses) of claims or claimants. Judge Weinstein instead adopted a "compensation-based" plan under which a portion of the settlement fund would be allocated to cash payments to particularly needy class members and their families, and the balance would be used to fund social service programs designed to provide general benefits to the entire class. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d at 151, 158. Seventy-five percent of the settlement fund was to be allocated to survivors of deceased

[1] In fact, Judge Weinstein later entered summary judgment against the several hundred plaintiffs who opted out of the class action in favor of individual actions, concluding (i) that none of the opt-out plaintiffs could prove that his or her ailment or ailments were caused by Agent Orange, (ii) that none of the opt-out plaintiffs could prove which defendant manufactured the Agent Orange that allegedly injured him or her, and (iii) that all of the opt-out plaintiffs' claims were barred by the military-contractor defense. The court of appeals affirmed, concluding that all defendants were entitled to summary judgment on the basis of the military contractor defense. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 187, 189 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

veterans and to veterans who became totally disabled due to illness before 1995—*i.e.*, ten years beyond the date of settlement and 20-25 years after any possible exposure. The remaining 25 percent was to be used to establish a class assistance foundation for the benefit of all of the veterans in the class—including respondents—in order to help them "mobilize themselves and others to deal with their medical and related problems." *Id.* at 158.

Apart from two minor aspects relating to the distribution of the settlement fund, the court of appeals upheld the settlement in its entirety.[2] It unequivocally rejected a challenge to the adequacy of class member representation, specifically rejecting the argument advanced by various objectors—and later repeated by respondents—that "the diverse interests of the class make adequate representation virtually impossible." *Id.* at 167. Indeed, the court of appeals agreed with Judge Weinstein that there was no significant difference among class members in light of the fact that all class members' claims had serious common weaknesses. Observing that none of the class members had a realistic chance of success on the merits, the court of appeals concluded that the settlement was fair, reasonable, and adequate. In reliance on these rulings, petitioners paid $180 million to settle all of the class members' claims, including $45 million for the general benefit of all class members, including those such as respondents who might become ill after 1994.

. 2. Two years after the judgment approving the *Agent Orange* settlement became final, two new actions (the

[2] The court of appeals concluded that the Class Assistance Fund should be administered directly by the district court, rather than by an independent board of trustees, and that it should be managed so the funds would eventually be "consumed" in their entirety. The Class Assistance Fund ultimately distributed $71.3 million for the benefit of all class members. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 184-86 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

Ivy/Hartman actions) were filed against petitioners on behalf of a purported class of Vietnam veterans who claimed to have discovered injuries—which they asserted had been caused by exposure to Agent Orange—after the settlement was reached. Judge Weinstein dismissed their claims, concluding that they were precluded by the 1984 settlement. The plaintiffs appealed, contending (as the present respondents later would) that future claimants had been inadequately represented in connection with the original class action. In rejecting this argument, the court of appeals noted that it was not "writing on a clean slate" and that in any event, even nine years later, "the fundamental fairness of the *Agent Orange I* settlement remains unshaken." *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d at 1437.

The court of appeals specifically rejected the argument that separate counsel should have been appointed to represent the interests of class members whose symptoms would manifest themselves only after the 1984 settlement, concluding that "the even-handed treatment of both identified and unidentified legitimate claimants in the *Agent Orange I* settlement and the dim prospects of success both then and now" rendered separate counsel unnecessary. *Id.* In fact, the court of appeals noted (for the second time) that the representation of all the class members in *Agent Orange I* was "more than adequate to protect [the *Ivy/Hartman* plaintiffs'] interests," and that class members who became ill after the settlement was reached—having been parties to a class action lawsuit in which there was a final settlement and judgment—were thus barred from pursuing claims against petitioners. *Id.*

3.a. In 1998, five years after the court of appeals affirmed the entry of summary judgment in the *Ivy/Hartman* actions, respondents filed separate individual actions against petitioners. In their complaints, respondents alleged that they had recently become ill and that their illnesses had been caused by exposure to Agent Orange during the Vietnam War. Respondents had not attempted to intervene in the class

action litigation, to opt out of the class, or to object to the fairness of the settlement; they also had not participated in the *Ivy/Hartman* litigation. Like the *Ivy/Hartman* plaintiffs, respondents had not fallen ill by 1984 when the settlement became final. Respondents asserted that their illnesses did not manifest themselves until after the portion of the settlement devoted to providing direct cash payments to veterans was exhausted. They contended that their inability to receive direct cash payments necessarily meant that they could not have been adequately represented in connection with the settlement.

b. Judge Weinstein rejected this contention, finding that respondents, like "[e]very veteran[,] . . . benefited" from the $71.3 million distributed by the Class Assistance Fund, even if they were not among the relatively small proportion of class members who received direct cash death or disability payments. App. 42a. As Judge Weinstein explained, the Class Assistance Fund financed a variety of programs that, among other things, contributed substantially to the passage of federal Agent Orange legislation, which continues to provide benefits to many class members—including respondent Isaacson. App. 42a.

c. The court of appeals reversed (App. 1a-20a), this time concluding that the doctrine of *res judicata* did not bar further litigation of the issue of adequate representation. Instead, the court held that it was obligated to decide *de novo* whether respondents had been adequately represented, notwithstanding its own prior holdings that all nonnamed class members, including those whose symptoms had not yet manifested at the time of the settlement, had in fact been adequately represented and that the class action settlement was fair, reasonable, and adequate. The court stated that the prior decisions had not expressly considered the specific situation of veterans becoming ill after 1994. App. 18a-19a.

Invoking the standards for class certification under Rule 23 set forth in this Court's intervening decisions in *Amchem*

Products, Inc. v. *Windsor*, 521 U.S. 591 (1997), and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), the court of appeals concluded that class members who became ill after 1994 had *not* been adequately represented, and that the failure to certify a subclass of individuals who would become ill after 1994 denied those class members due process of law. It concluded this even though Judge Weinstein and all of the attorneys and class members certainly knew in 1984—and the class action settlement expressly provided for the fact—that there would be some class members who would manifest symptoms only after 1994, and that the identities of those class members were not discernible in 1984. The only explanation given by the court of appeals was the assertion (which ignored the benefits obtained through the Class Assistance Fund) that the settlement "only provided for recovery for those whose death or disability was discovered prior to 1994" and "[n]o provision was made for post-1994 claimants." App. 19a. The court of appeals did not attempt to justify or explain the application of new legal standards to a long-final judgment.

d. Petitioners filed a timely petition for rehearing with a request for rehearing en banc. The court of appeals denied the petition and rejected the request on May 8, 2002. App. 21a-22a.

REASONS FOR GRANTING THE PETITION

The Second Circuit held that nonnamed class members cannot be precluded from collaterally attacking the judgment's binding effect on them on the grounds of inadequate representation, even when (i) adequacy of representation for all class members has been determined by the district court following hearings, (ii) that determination was affirmed on appeal, (iii) the time for seeking direct review of that determination has long since passed, (iv) another collateral attack by nonnamed class members—who like respondents had no symptoms at the time of the settlement and who claimed inadequacy of representation—has been litigated with the representation again deemed adequate, and (v) the settling defendants have irrevocably paid out the settlement proceeds in reliance on the finality of the settlement. The court of appeals did not assess the adequacy of representation as of the time the class was certified, or even when the settlement was approved and then reviewed on appeal. Instead, the court made a *de novo* evaluation as of the time of the collateral attack, making a *post-hoc* assessment of the results the dissatisfied class members turn out to have obtained and applying legal standards that did not exist at the times the settlement was negotiated, approved, and affirmed.

This approach conflicts with the ruling of the Ninth Circuit in *Epstein* v. *MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999), and is in serious tension with the rulings of the First and Third Circuits in *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), and *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994). In the *Epstein* case, the Ninth Circuit, on remand from this Court's decision in *Matsushita Electrical Industrial Co.* v. *Epstein*, 516 U.S. 367 (1996), held that the question of adequacy of representation in a settled class action may not be reopened in subsequent actions in which class members seek to escape the effects of the judgment. Under the Ninth Circuit's ruling, the appropriate methods for class members to express dissatisfaction with the certification of a class or the settlement of a class action that will affect their rights are to object to certification, to opt out of the class, or to object to the settlement in the trial court, followed by an appeal if necessary. The First and Third Circuits, like the Ninth Circuit, have also held that nonnamed class members may not bring collateral attacks on court-approved class action settlements, as long as the settlement court employed procedures that comported with due process.

The consequence of the Second Circuit's contrary holding is to open a new chapter (or chapters) in the otherwise-settled *Agent Orange* litigation—litigation that has produced

numerous published opinions by the district court and court of appeals, including opinions upholding the settlement against legal challenge. *See Hercules, Inc.* v. *United States*, 516 U.S. 417, 420 (1996) (summarizing *Agent Orange* litigation history). This conclusion not only undermines the legal peace that petitioners paid $180 million to secure, but also jeopardizes any other class settlement reached in the past in which the settlement class contained persons who could propound a minimally plausible contention that their circumstances differed from those of the class representatives and that they therefore were not "adequately" represented, despite explicit contemporaneous judicial findings to the contrary.

The court of appeals reached its (literally) unsettling conclusion by reasoning that this Court's decisions in *Amchem* and *Ortiz* (which construed Rule 23 on direct appeal from decisions approving settlements and thus differed fundamentally from this collateral attack) somehow nullified settled principles of *res judicata* and finality. The court read those decisions as implying that any member of a settlement class who claims a distinction from other class members of a sort not specifically discussed and explicitly rejected in approving the settlement has an absolute right to litigate the question of whether his or her interests were "adequately represented" years earlier, even if the courts at the time specifically found the representation of all class members to have been adequate.[3] Moreover the court below held that, in

[3] Asserting that allowing respondents' collateral challenge to proceed would be consistent with other decisions "recognizing the ability of later plaintiffs to attack the adequacy of representation in an earlier class action," App. 15a, the Second Circuit relied principally on the Fifth Circuit's opinion in *Gonzales* v. *Cassidy*, 474 F.2d 67 (1973). *Gonzales*, however, did not involve a class action settlement at all, but rather a judgment following trial on the merits; moreover, in *Gonzales*, the first and only event even suggesting that the rights of nonnamed class members were not adequately represented occurred after that judgment was entered—when the trial court clarified its judgment to hold that only the class representative, and none of the nonnamed class members, was entitled to retrospective relief.

evaluating the question of adequacy of representation during collateral litigation, the disappointed class members not only have the right to challenge the binding effect of the settlement based on facts that develop subsequently, but also are entitled to the benefit of any intervening changes in the law.

The consequences of the decision below, if permitted to stand, will be long-enduring and pernicious. Simply put, that decision so substantially undermines the finality accorded to fully-reviewed class action settlements and judgments that it renders virtually impossible the achievement of any consensual global settlement—or even a truly final judgment after trial and appeal—in many complex class actions. If class action litigation cannot result in a settlement or judgment that reliably binds nonnamed class members, the goals of the class action procedure will have been gravely subverted. This Court should grant the petition to resolve the circuit split on the important and recurring questions of law presented by this case.

I. THE COURT SHOULD DECIDE WHETHER, ONCE THE ISSUE OF ADEQUACY OF REPRESENTATION HAS BEEN DETERMINED, IT IS *RES JUDICATA* AND MAY NOT BE COLLATERALLY RELITIGATED BY CLASS MEMBERS WHO HAD THE OPPORTUNITY TO OPT OUT, OBJECT, AND APPEAL THE SETTLEMENT.

The doctrine of *res judicata* provides that a matter already litigated and resolved is binding on the parties and cannot be relitigated. Under this principle, a judgment in a class action, including a judgment entered upon a settlement, normally binds absent class members. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985). The question presented in this case is whether that principle applies to a class

member's claim that he or she had been inadequately represented in the original proceedings. The court of appeals held that it does not, and consequently permitted a collateral attack on the otherwise-final settlement in the *Agent Orange* litigation—a settlement that was reached almost 20 years ago following extensive litigation, negotiation, and judicial scrutiny. Indeed, the court ruled that *res judicata* did not apply even though the issue of "inadequacy of representation" of veterans with no manifested illness had been raised on direct appeal and then again later by other nonnamed class members seeking to attack the settlement collaterally, and had been rejected on the merits both times.

Moreover, the court ruled that such a collateral attack will succeed in unwinding an otherwise final settlement (or judgment) whenever the unnamed class member can satisfy the district court or court of appeals that, with the benefit of hindsight, resolution of the class action turned out to be less advantageous for him or her than it was for other class members. In this inquiry, the court appears to have held, no consideration whatever was due the unfairness to settling defendants of allowing new litigation at such a belated juncture. App. 16a.

The principal question thus posed is whether a judicial determination, upheld on appeal, that all nonnamed class members' interests were adequately represented is *res judicata*, and therefore no longer subject to collateral attack, as against a class member who had the opportunity to but did not opt out, object, or appeal. The Second Circuit's rejection of this proposition squarely conflicts with the rule in the Ninth Circuit. In *Epstein* v. *MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999), the Ninth Circuit, on remand from this Court's decision in *Matsushita Electric Industrial Co., Ltd.* v. *Epstein*, 516 U.S. 367 (1996), held that as long as the procedures followed by the certifying court complied with due process, "the absent class members' due process right to adequate representation is protected not by

collateral review, but by the certifying court initially, and thereafter by appeal." *Epstein*, 179 F.3d at 648-50 (per O'Scannlain, J.).

The Ninth Circuit further concluded, in conflict with the court below, that the "process due" absent class members consists of fair procedures employed by the trial court during the pendency of the class action litigation to determine the adequacy of representation. That conclusion was held to follow directly from this Court's holding in *Matsushita* that members of a plaintiff class in a Delaware state-court shareholder suit who were also named plaintiffs in a rival class action in federal court but who did not opt out of the Delaware state-court class, were necessarily "bound, then, by the judgment" resulting from the settlement of the Delaware action. *Matsushita*, 516 U.S. at 379.

The Ninth Circuit's ruling is in accord with decisions of the First and Third Circuits, which likewise have held that the appropriate avenue for obtaining review of allegedly erroneous class determinations is a direct appeal, not a collateral attack at some later time. *See Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991); *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994). Those courts have agreed that a final judgment, entered pursuant to a court-approved settlement agreement, cannot be subject to collateral attack by dissatisfied class members who were afforded a constitutionally sufficient opportunity to voice their objections before the court that certified the class and approved the settlement.

In *Nottingham Partners*, the First Circuit held that a release that surrendered class members' federal securities-law claims, given in settlement of a Delaware state-court class action, barred dissatisfied class members from pursuing those claims in federal court. In contrast to *Epstein* and to the *Agent Orange* litigation, the dissatisfied class members in *Nottingham Partners* had not even been provided the opportunity to opt out of the class. Despite this feature, which the

dissatisfied class members sought to challenge on collateral attack, the First Circuit held that "a court-approved settlement containing a release may be applied against a class member who is not a representative member, even if that member objects to the settlement, so long as acceptable procedural safeguards have been employed." 925 F.2d at 33. Because the "Delaware courts, affording all the prophylaxis which the Due Process Clause commands," *id.*, adjudicated the question of whether class members should have been allowed to opt out, the First Circuit held that the class members' only recourse consisted of direct appeals in state court, followed by a petition to this Court for a writ of certiorari, not of an independent action in the lower federal courts "in the vain pursuit of back-door relief." *Id.*

Grimes presented a similar factual situation and produced a similar ruling from the Third Circuit, which held that dissatisfied class members in a Delaware state court class action were barred by the settlement of that action from pursuing their claims in independent litigation. The opportunity provided the dissatisfied class members to be heard in the Delaware state-court proceedings and to raise the issue on direct appeal meant that they "had been granted all the process that was due." 17 F.3d at 1558.

The court below purported to harmonize its decision with that of the Ninth Circuit in *Epstein*, but its discussion shows the irreconcilable conflict. After accurately describing the Ninth Circuit's holding that due process "'requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court'" and subsequent courts on direct review, not by "'collateral second guessing of those determinations,'" App. 17a n.6 (quoting *Epstein*, 179 F.3d at 648), the Second Circuit declined to "adopt[] the Ninth Circuit's decision in *Epstein*," because "neither the district court nor this Court has [previously] determined the adequacy of representation *with respect to these plaintiffs* whose injuries did not arise

until after the settlement expired," App. 17a n.6 (emphasis in original). This explanation reflects the Second Circuit's belief that *res judicata* does not set in unless the courts have previously determined the issue of adequacy of representation in connection with the specific argument and circumstances presented by a given class member on collateral attack. That belief is contrary to the proper focus by the Ninth Circuit on the adequacy of the *process* provided in the prior proceeding for absent class members to voice any objection to their representation.

The discordant approach of the Second Circuit creates a rule under which any class member who can subsequently assert that his or her personal circumstances differ in some way from those of the class representatives (and from other class members who have previously raised and lost similar objections on collateral attack) is free to reopen the issue of adequacy of representation in a fresh proceeding. That regime is untenable, inconsistent with fundamental notions of finality, and certainly not required by due process.[4]

The willingness of the court of appeals to disregard its prior response to the *Ivy/Hartman* collateral attack demonstrates the extraordinary breadth of its rule allowing indi-

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[4] *See also, e.g.*, Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201, 214 (1999) (allowing class members who do not opt out thereafter to collaterally attack the determination of adequacy of representation "represents serious danger to the finality that is the essence of class litigation and settlements"); William T. Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein *v.* MCA, Inc., 73 N.Y.U. L. Rev. 1149, 1159-60 (1998) ("If every member of the class who does not actually appear in a class suit prior to judgment is able to trigger a review of the quality of the efforts of those representing the class, we will have, insofar as class actions are concerned, reinvented the problem of inefficiency and second guessing that is solved by the rule of finality and recognition of judgments.").

vidualized arguments about inadequacy of representation. The court distinguished the current respondents from the *Ivy/Hartman* class members, whose claim of inadequate representation the Second Circuit had previously rejected, because the *Ivy/Hartman* class members had become ill in the first ten years after the settlement whereas the present respondents did not develop illnesses until after that period. As of 1984, however, when the class representatives negotiated the settlement, there was no difference among the absent class members who were not yet ill. That is to say, no one then could have known whether they would become ill by 1994, only after 1994, or never. Thus, if the *Ivy/Hartman* plaintiffs were adequately represented, respondents must have been as well—unless one looks at the outcomes retrospectively as of the time of respondents' collateral attack, fourteen years after the *Agent Orange* settlement.

Rather than creating an incentive for class members who receive notice of an action or a proposed class settlement and feel dissatisfied with their representation to object to certification, representation, or the proposed settlement, the rule that now applies in the Second Circuit encourages nonnamed class members to withhold any objection. The only way they could be bound by the resulting settlement or judgment would be if they informed the district court of their concerns regarding the adequacy of the representation. It should go without saying that this rule will drastically reduce the incentive for defendants to settle. *See, e.g.*, Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 S. Ct. Rev. 219, 270-71 (noting that the prospect of collateral attacks on class-action settlements will encourage class members to "decide where they have the best opportunity to make the challenge, and engage in their own kind of forum shopping," and that this will result in a "significantly reduced incentive for defendants to enter into a global class action settlement").[5]

The Second Circuit's analysis also disregards the fact that the district court has a special duty to look out for the interests of nonnamed class members, precisely because they are not present but will be bound by the disposition of the case. *See, e.g.*, *Reynolds* v. *Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002) (Posner, J.) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action a fiduciary of the class . . . ."); *Grant* v. *Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987). That is part of the reason why the Ninth Circuit found it proper to focus upon the procedural regularity of the initial

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[5] Due process does require, of course, that notice be constitutionally adequate for a judgment to bind an absent class member. The question of adequacy of notice, however, was properly resolved by Judge Weinstein, who crafted extraordinary measures to ensure adequate notice—measures that the court of appeals itself "concluded [were] the 'best notice practicable' under Federal Rule of Civil Procedure 23(c)(2)." App. 6a. Although the court below suggested in a footnote (App. 19a n.8), that "plaintiffs likely received inadequate notice" because "*Amchem* indicates that effective notice could likely not ever be given to exposure-only class members," it explicitly stated that this was not part of the basis for its decision. App. 19a.

In any event, although *Amchem* left open the question whether the class of individuals from all walks of life who may have been exposed to asbestos over a 50-year period was too amorphous ever to receive adequate notice, that concern does not apply to the far more identifiable class of military veterans who served in Vietnam during specified times, which cannot reasonably be described as "unselfconscious and amorphous," *Amchem*, 521 U.S. at 628. Moreover, as discussed *infra* at pp. 19-27, the suggestion that changed views on adequacy of notice inferable from the subsequent decision in *Amchem* provide a basis to reopen a matter in which a final judgment was long since entered completely disregards this Court's admonition that the validity of a final judgment is not called into question even if "the judgment may have been wrong or rested on a legal principle subsequently overruled in another case," *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981).

proceedings rather than trying to isolate specific claims that individual class members had not previously litigated. In this case, of course, there can be no question that both the district court and the court of appeals gave careful consideration to the fairness of the plan toward class members whose symptoms would manifest only after the time of the settlement.

The split created by the Second Circuit's opinion concerns an issue of great moment. Multidistrict litigation like the *Agent Orange* litigation, in which actions can be transferred "to any district," 28 U.S.C. § 1407(a), highlights the need for uniformity and review by this Court. The outcome in mass tort litigation should not be determined by the outcome of the administrative decision to assign that litigation to a district in one judicial circuit rather than another for pretrial management.

In addition, as mentioned above, at the time the class was notified of the impending settlement in 1984, respondents were in precisely the same position as were the plaintiffs in the *Ivy/Hartman* litigation. At that time, neither the *Ivy/Hartman* plaintiffs nor respondents here had manifested illnesses. At that time, all such absent class members were called upon to object to the settlement, to opt out of the class, or to stand bound by the settlement judgment. The Second Circuit previously held that the *Ivy/Hartman* plaintiffs were precluded from collaterally attacking the settlement, concluding that the process followed at the time of the settlement was fair and that adequacy of representation as to all class members had been litigated and resolved at that time. That ruling, specifically addressing the issue with respect to class members who were asymptomatic in 1984, should certainly have precluded still further relitigation in later suits.

Accordingly, even if there were some merit to the Second Circuit's approach of allowing absent class members an opportunity to lodge a collateral attack on a settlement to challenge the adequacy of representation, principles of *res judicata* and practical efficiency in judicial administration

must bar endless relitigation of that issue by each person who becomes disgruntled with the settlement years after it has been completed and approved and can identify some difference in circumstances from those of previous objectors and collateral litigants—particularly one obviously foreseen by the settlement court and the court of appeals on direct review of the settlement.

This Court should decide, therefore, whether once a case is settled and there has been a final ruling that the class has been adequately represented, *res judicata* bars any collateral challenge to that judgment or whether, as the court below here held, absent class members are entitled to litigate their own circumstances in separate proceedings.

II. THE COURT SHOULD ALSO RESOLVE WHETHER ADEQUACY OF REPRESENTATION IS TO BE DETERMINED AS OF THE TIME OF THE ORIGINAL CLASS LITIGATION OR IN LIGHT OF EVENTS YEARS AFTER IT HAS BECOME FINAL AND ALL OF THE SETTLEMENT PROCEEDS HAVE BEEN DISBURSED.

Even if *res judicata* does not bar further consideration of the question of adequacy of representation, the Second Circuit committed a fundamental error in the way it conducted that inquiry. Rather than adjudicating the collateral attack by examining the adequacy of representation question from the perspective of the time when the class was certified and the trial and appellate courts determined that representation of all class members was adequate, the court assessed the issue from today's perspective. Thus, it viewed the facts and applied the law as they now exist, with the benefit of hindsight, (a) concluding that it now appears that other class members in fact achieved different or greater benefits under the settlement than did these plaintiffs, and (b) assessing the legal issue on the basis of intervening changes in the law. In so doing, it rendered a decision that is especially destabilizing.

1. The Ninth Circuit in *Epstein* correctly concluded that fair procedures at the time of certification and settlement accord full due process to nonnamed class members, and that under such procedures the adequacy of representation is of course judged at the time they are employed. 179 F.3d at 648-49 (per O'Scannlain, J.) ("'[T]here has been a failure of due process only in those cases where it cannot be said that *the procedure adopted*, fairly insures the protection of the interests of absent parties who are to be bound by it.'") (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940)); *see also Nottingham Partners*, 925 F.2d at 33 (concluding that if proper procedures were employed by the certifying court, objections to an allegedly erroneous class determination had to be remedied on direct appeal on a petition for certiorari, and not by recourse to collateral attack in "the vain pursuit of backdoor relief"); *Grimes*, 17 F.3d at 1558 (opportunity to appeal and then seek a writ of certiorari to review adverse class determination provided "all the process that was due").

The Second Circuit in this case appears to have concluded that the assessment of adequacy can and should be made *post hoc*, based on the outcomes for individual class members. The court reasoned that even though it had "previously concluded that there was adequate representation of all class members in the original *Agent Orange* settlement," (App. 13a), and then later reaffirmed that conclusion in *Ivy/Hartman*, respondents had not in fact been adequately represented, and were therefore "not proper parties" to the class action and "cannot be bound by the settlement" because—as it turned out—their claimed illnesses manifested themselves after the funds available under the settlement for direct cash payments to veterans had been exhausted. App. 20a.

The court of appeals reached this conclusion even though, when the settlement was approved in 1984, all persons who were then "exposure-only" class members were situated similarly. That is to say, in 1984 no one could know

which class members would ultimately manifest symptoms, or when those symptoms would manifest. What was known in 1984—besides the fact that some class members would likely become ill in the subsequent years, that some number of those class members would attribute their illnesses to Agent Orange exposure, and that no class member had a promising legal claim of any sort—was that the claims of class members first manifesting symptoms after 1994 would be just like those of class members whose symptoms had surfaced earlier, only even weaker on account of the additional obstacles in proving causation. *See In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396, 1418 (E.D.N.Y. 1985) (observing that "disabilities or deaths occurring many years after service in Vietnam, or among older veterans for whom the background incidence is higher, have a relatively diminished connection with Agent Orange exposure in terms of both public perception and the likelihood of intervening or contributing causes"), *aff'd in relevant part*, 818 F.2d 179 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

2. Moreover, in concluding that adequacy of representation had to be judged in light of this Court's decisions in *Amchem* and *Ortiz*—decisions handed down many years after the *Agent Orange* settlement became final (and that themselves arose on direct review)—the court of appeals held also that collateral attacks are properly judged on a hindsight view of any intervening changes in the *law*. That was clear error, and one that threatens to unsettle longstanding principles of finality.

To be sure, in resolving cases on direct review in which final judgment has not been rendered, it is appropriate to apply new judicial interpretations retroactively. *See, e.g.*, *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases *still open on direct review* and as to all events, regardless of

whether such events predate or postdate our announcement of the rule.") (emphasis added). The rule adopted by the Second Circuit, however, completely disregards the well-established "limitation inherent in the principle [of retroactivity] itself"—that "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 758 (1995). Indeed, even in the criminal law, where matters of life and death may be at stake, the Court has refused to let even new constitutional interpretations serve as a basis for a collateral attack on a judgment. *See, e.g., Teague* v. *Lane*, 489 U.S. 288 (1989), and its progeny.

The reasons for this limitation are not difficult to understand. In the first place, under a contrary rule virtually any opinion of this Court could reopen countless final judgments, undermining the fundamental interest in finality. Moreover, unlike the situation presented on direct appeal of a proposed class action settlement (the procedural posture of both *Amchem* and *Ortiz*)—when any judicial errors can be corrected before settlement proceeds are paid out—challenges made only after the time for direct appeal has expired come too late to restore the defendants to their pre-settlement position. The defendants thus do not get the benefit for which they bargained during settlement and paid for (here, to the tune of $180 million); they cannot be placed in the position they would have occupied had there been no settlement or had the settlement been judicially disapproved during direct review, for the settlement proceeds cannot be recouped.

This case well illustrates the problem. With the explicit approval of the district court and the court of appeals, petitioners relied on the seemingly final determination that all potential claimants who did not opt out had been adequately represented—and therefore that the settlement assured them complete peace from further litigation. Indeed, as Judge Posner has recognized, when it is impossible to restore the parties in class action litigation to their pre-settlement positions (*e.g.*, because the settlement proceeds have been disbursed by the defendants and spent by class members), allowing litigation to recommence strips from the defendants the protections for which they bargained in agreeing to settle the litigation, and in doing so violates the *defendants'* due process rights. *See In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1019 (7th Cir. 1998).

3. Thus, even if *Amchem* and *Ortiz*, correctly understood, might have caused Judge Weinstein to decline to certify a class in the *Agent Orange* litigation had the class certification question been first presented to him today (and even that proposition is highly dubious[6]), they certainly cannot

[6] For example, in *Amchem* and *Ortiz* conflicts of interests inhered between class members with strong claims and those with weaker claims, quite unlike the *Agent Orange* litigation, in which the district court and court of appeals both observed that all class members had the same "dim prospects of success" as a consequence of the common barriers to recovery. *See In re Agent Orange Prod. Liab. Litig.*, 996 F.2d at 1437 (2d Cir. 1993). (Unlike with Agent Orange, courts and juries have repeatedly found that asbestos has caused injuries to plaintiffs.) As this Court recognized, the settlement negotiations at issue in *Amchem* regarding "essential allocation decisions" demonstrated a lack of "structural assurance of fair and adequate representation" for both present and future claimants. *Amchem*, 521 U.S. at 627. Indeed, in both *Amchem* and *Ortiz*, adequacy of representation was called into serious question by the class representatives' attorneys' negotiation of allocation issues with defense counsel. In the *Agent Orange* litigation, by contrast, Petitioners negotiated a lump-sum settlement with the class and then stepped back so that the district court could make a neutral determination of how to allocate the proceeds most fairly among the commonly-represented members.

Moreover, *Amchem* and *Ortiz*, being asbestos cases, involved a substantial problem that numerous "exposure-only" class members may not have known of their exposure until long after the date of the settlement; in contrast, the *Agent Orange* class of military veterans who served in Vietnam between specified dates cannot sensibly be described as similarly "unselfconscious and amorphous." *Id.* at 628. Finally, *Amchem* involved a class that was certified solely for purposes of settlement, a fact that warrants additional judicial scrutiny, and the class members in *Ortiz* were not permitted to opt out. *See id.* at 620 (noting that a court asked to

justify upsetting a judgment that became final 13 years before the first of those two cases was decided. As this Court admonished in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981), "the *res judicata* consequences of a final, unappealed judgment on the merits" are not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *See also id.* at 403 (Blackmun, J., concurring) (acknowledging the existence of a "special need for strict application of *res judicata* in complex multiple party actions . . . so as to discourage 'break-away' litigation"); *Reynoldsville Casket*, *supra*, 514 U.S. at 758 (noting that new legal principles do not apply to closed cases); *Durfee* v. *Duke*, 375 U.S. 106, 110 (1963) (holding that collateral attacks on subject-matter jurisdiction are precluded if the issue was fully and fairly litigated and finally decided by the court that entered the judgment).

It is simply no answer to respond, as the court below did, (App. 16a), that respondents "do not attack the merits or finality of the settlement itself, but instead argue that they were not proper parties to that judgment," and that petitioners are not exposed to new and duplicative liability "if plaintiffs were never proper parties to the prior judgment in the first place." As then-District Judge Patrick Higginbotham observed:

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certify a settlement-only class "will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold"); *Ortiz*, 527 U.S. at 845-47 (noting that mandatory class actions raise Seventh Amendment issues and magnify significantly the usual tensions between representative and individual litigation). Here, in contrast, the definition of the class was fixed as a part of litigation at the time the settlement was negotiated and the class settlement notice was sent out, and class members had the right to opt out, a right that hundreds of class members exercised (only later to suffer summary judgment on the merits).

> [A]dequacy of representation does not revolve around whether the various class members receive the relief they seek. If class members could sit back and see whether the court awards them a desirable judgment and then attack the judgment collaterally if unsatisfied with the award they receive, the purpose of *res judicata* would be undermined and class action defendants would be placed in a precarious and unfair position. Due process entitles class members to notice and to adequate representation. It does not entitle them to continue to challenge the defendant's conduct until they are ultimately successful.

Quigley v. *Braniff Airways, Inc.*, 85 F.R.D. 74, 76-77 (N.D. Tex. 1979). In summary, the proper answer to the question as phrased by the court below—"the effect of . . . *Amchem* . . . and *Ortiz* . . . on a previously settled class action" for which the time for direct review has expired (App. 1a-2a)—must be "none."

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

The Second Circuit's decision is not simply incorrect; if permitted to stand, it would seriously impair the class action device. Under the Second Circuit's rule, settlement of a class action upon a finding, explicitly upheld on appeal, that nonnamed class members were adequately represented signals not the end of the litigation, but merely the beginning of a new stage of litigation. During that new stage, the defendant must face the distinct possibility of numerous collateral attacks, potentially from any class member who turns out to be dissatisfied with the outcome of the original action and wishes to escape its binding effect (or, more realistically, to induce the defendant to offer to settle in exchange for additional payments that will inure to him or her alone). Simply put, the Second Circuit's decision ensures that defendants cannot settle with confidence that they have achieved peace

from further litigation. In creating this unjustified exception to this Court's repeated admonitions about the importance of repose and finality in litigation, the Second Circuit's ruling portends class action litigations that, for all intents and purposes, will never end.

Consequently, the rule adopted by the Second Circuit would defeat the important public interest in encouraging the settlement of class actions. Although the courts of appeals have consistently noted that the public interest favoring the settlement of litigation is even stronger in the context of class action litigation, *see, e.g.*, *Bano* v. *Union Carbide Corp.*, 273 F.3d 120, 129 (2d Cir. 2001); *In re Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000), the holding of this case substantially disserves that interest. Under the Second Circuit's rule, the purported "settlement" of a class action is final and binding on defendants, but not on members of the plaintiff class who turn out to be dissatisfied with what they receive under the settlement, even if they received constitutionally adequate notice and failed to opt out of the class or object to the settlement. *See, e.g.*, Marcel Kahan & Linda Silberman, Matsushita *and Beyond*, 1996 S. Ct. Rev. at 270 (noting the opportunity for forum shopping that would be afforded by a rule allowing a broad right to collaterally attack determinations of adequate representation). The Second Circuit's rule disregards the fact that defendants in class actions have a vital interest in "seeing the entire plaintiff class bound by *res judicata* just as [they are] bound." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 805 (1985). If defendants in class actions cannot gauge whether and to what extent settlements will be final, settlements will be inhibited to an extraordinary degree.

Here, the settlement negotiated to terminate the *Agent Orange* litigation, and approved by the district court and the Second Circuit, was explicitly premised on it being the last word on respondents' liability to all class members who did not opt out. Had the settlement not covered all class members, there would have been no settlement. And "[h]ad there been no settlement, there would have been no recovery for [any of] the veterans." App. 39a. And even if Judge Weinstein's finding that all class members were adequately represented was an abuse of discretion (which, as the Second Circuit held, it was not), the time to seek relief from that finding passed many years before respondents filed their lawsuits.

Because the decision below creates a circuit split with respect to issues of profound import to the consensual resolution of class actions, and because neither due process nor the Federal Rules of Civil Procedure require the deleterious consequences of the ruling below, that ruling should not go unreviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2002

APPENDICES

APPENDIX A

United States Court of Appeals,
Second Circuit

Daniel Raymond STEPHENSON, Susan Stephenson, Daniel Anthony Stephenson, Emily Elizabeth Stephenson, Joe Isaacson and Phyllis Lisa Isaacson,
Plaintiffs-Appellants,

v.

DOW CHEMICAL CO., Monsanto Co., American Home Products, Inc., Hercules Incorporated, Occidental Chemical Corporation, Ultramar Diamond, Chemical Land Holdings, Inc., Maxus Energy Corp., Harcros Chemical Inc., Shamrock Corp., and Does 1-100, Thompson Hayward Chemical Co., T-H Agriculture & C.D.U. Holding, Inc., Uniroyal Chemical Co.,
Defendants-Appellees.

Docket Nos. 00-7455(L), 00-9120(CON).

Argued May 23, 2001.
Decided Nov. 30, 2001.

[273 F.3d 249]

Before: CARDAMONE and F.I. PARKER, Circuit Judges, and SPATT, District Judge.*

PARKER, Circuit Judge.

This appeal requires us to determine the effect of the Supreme Court's landmark class action decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138

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* The Honorable Arthur D. Spatt, of the United States District Court for the Eastern District of New York, sitting by designation.

L.Ed.2d 689 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), on a previously settled class action concerning exposure to Agent Orange during the Vietnam War. Daniel Stephenson and Joe Isaacson are two Vietnam War veterans who allege that they were injured by exposure to Agent Orange while serving in the military in Vietnam. In the late 1990s, Stephenson and Isaacson (along with their families) filed separate lawsuits against manufacturers of Agent Orange. These lawsuits were eventually transferred to Judge Jack B. Weinstein in the Eastern District of New York by the Judicial Panel on Multidistrict Litigation ("MDL Panel").

In 1984, however, some twelve years before these suits, virtually identical claims against these defendants, brought by a class of military personnel who were exposed to Agent Orange while in Vietnam between 1961 and 1972, were globally settled. The Isaacson and Stephenson actions were brought in 1998 and 1999 respectively. Judge Weinstein, who presided over the 1984 settlement, dismissed the claims of Stephenson and Isaacson, concluding that the prior settlement barred their suits. On appeal, plaintiffs chiefly contend, citing *Amchem* and *Ortiz*, that they were inadequately represented and, therefore, due process considerations prevent the earlier class action settlement from precluding their claims. Because we agree that *Amchem* and *Ortiz* prevent applying res judicata to bar plaintiffs' claim, we vacate the district court's dismissal and remand for further proceedings.[1]

I. BACKGROUND

A. *Prior Agent Orange Litigation*

The Agent Orange class action litigation has a lengthy and complicated history, [252] which we set forth in some detail below in order to convey the magnitude of this decision.

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[1] Trial Lawyers for Public Justice, as *amicus curiae*, filed a brief in support of the plaintiffs' position.

The first Agent Orange litigation began in the late 1970s, when individual veterans and their families filed class action suits in the Northern District of Illinois and Southern and Eastern Districts of New York, alleging that exposure to Agent Orange caused them injury. *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 988 (2d Cir.1980) ("*Agent Orange I*"). By order of the MDL Panel, these actions were transferred to the Eastern District of New York and consolidated for pretrial purposes. *Id.* Plaintiffs asserted claims of negligent manufacture, strict liability, breach of warranty, intentional tort and nuisance. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740, 750 (E.D.N.Y.1984) ("*Agent Orange III* "); *aff'd* 818 F.2d 145 (2d Cir.1987).

In 1983, the district court certified the following class under Federal Rule of Civil Procedure 23(b)(3):

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y.1983) ("*Agent Orange II*"). To support class certification, the district court specifically found:

> (1) that the affirmative defenses [including the "military contractor" defense] and the question of general causation are common to the class, (2) that those questions predominate over any questions affecting individual members, and (3) given the enormous potential size of plaintiffs' case and the judicial economies that would result from a class trial, a

> class action is superior to all other methods for a "fair and efficient adjudication of the controversy."

Id. at 724. The court also ordered notice by mail, print media, radio and television to be provided to class members, providing in part that persons who wished to opt out must do so by May 1, 1984. *Id. at 729-32.*

Trial of the class claims was to begin on May 7, 1984. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 154 (2d Cir.1987) ("*Agent Orange V*"). On the eve of trial, the parties reached a settlement. *Agent Orange III*, 597 F.Supp. at 746. The settlement provided that defendants would pay $180 million into a settlement fund, $10 million of which would indemnify defendants against future state court actions alleging the same claims. *See id.* at 863-65. The settlement provided that "[t]he Class specifically includes persons who have not yet manifested injury." *Id.* at 865. Additionally, the settlement specifically stated that the district court would "retain jurisdiction over the Fund pending its final disposition." *Id.* at 866.

The district court held fairness hearings throughout the country, and approved the settlement as fair, reasonable and adequate. *See id.* at 746-47; *see also Ryan v. Dow Chem. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 618 F.Supp. 623 (E.D.N.Y.1985) (approving final settlement and dismissing merits). The court rejected the motion to certify a subclass of those class members who objected to terms of the settlement. *Agent Orange III*, 597 F.Supp. at 757. The court concluded that "[n]o purpose would have been served by [253] appointing counsel for a subclass of disappointed claimants except to increase expenses to the class and delay proceedings."[2] *Id.*

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[2] The district court had earlier rejected a motion to establish a plaintiff's steering committee, reasoning that lead counsel had expressed willingness to "consider all ideas and suggestions submitted by attorneys for separate plaintiffs." *In re "Agent Orange" Prod. Liab. Litig.*, 534 F.Supp. 1046, 1052-53 (E.D.N.Y.1982).

Seventy-five percent of the $180 million was to be distributed directly "'to exposed veterans who suffer from long-term total disabilities and to the surviving spouses or children of exposed veterans who have died.'" *Agent Orange V*, 818 F.2d at 158. "A claimant would qualify for compensation by establishing exposure to Agent Orange and death or disability not 'predominately' caused by trauma...." *Id.* Payments were to be made for ten years, beginning January 1, 1985 and ending December 31, 1994:

> No payment will be made for death or disability occurring after December 31, 1994. Payment will be made for compensable deaths occurring both before and after January 1, 1985. Payments will be made for compensable disability to the extent that the period of disability falls within the ten years of the program's operation.

Ryan v. Dow Chem. Co. (In re "Agent Orange" Prod. Liab. Litig.), 611 F.Supp. 1396, 1417 (E.D.N.Y.1985) ("*Agent Orange IV*"), *rev'd in part on other grounds, In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir.1987) ("*Agent Orange VI*"). "Most of the remaining [25%] of the settlement fund established the Agent Orange Class Assistance Program, ... which made grants to agencies serving Vietnam veterans and their families." *Ivy v. Diamond Shamrock Chems. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 996 F.2d 1425, 1429-30 (2d Cir.1993) ("*Ivy/Hartman II*"). Explaining the creation of this kind of fund, Judge Weinstein stated that it was "[t]he most practicable and equitable method of distributing benefits to" those claimants who did not meet eligibility criteria for cash payments. *Agent Orange IV*, 611 F.Supp. at 1431.

We affirmed class certification, settlement approval and much of the distribution plan. *See Agent Orange V*, 818 F.2d 145, 163-74 (approving settlement and class certification); *Agent Orange VI*, 818 F.2d 179, 184-86 (reversing only the portion of distribution plan that allowed an independent

foundation to monitor the funding of projects to assist the class, but allowing district court to establish and supervise such a fund). We rejected challenges to class certification, concluding that "class certification was justified under Rule 23(b)(3) due to the centrality of the military contractor defense." *Agent Orange V*, 818 F.2d at 166-67. We specifically rejected an attack based on adequacy of representation, again based on the military contractor defense which, we reasoned, "would have precluded recovery by all plaintiffs, irrespective of the strengths, weaknesses, or idiosyncrasies of their claims." *Id.* at 167. We additionally concluded that the notice scheme devised by Judge Weinstein was the "best notice practicable" under Federal Rule of Civil Procedure 23(c)(2). *Id.* at 167-69. Finally, we affirmed the settlement as fair, reasonable and adequate, given the serious weaknesses of the plaintiffs' claims. *See id.* at 170-74.

In 1989 and 1990, two purported class actions, *Ivy v. Diamond Shamrock Chemicals Co.* and *Hartman v. Diamond Shamrock Chemicals Co.*, were filed in Texas state courts. *Ivy/Hartman II*, 996 F.2d at 1430. These suits, on behalf of Vietnam [254] veterans exposed to Agent Orange,[3] sought compensatory and punitive damages against the same companies as in the settled suit. *See Ivy/Hartman I*, 781 F.Supp. at 912-13. The plaintiffs alleged that their injuries manifested only after the May 7, 1984 settlement. *See id.* Additionally, the *Ivy/Hartman* plaintiffs expressly disclaimed any reliance on federal law, asserting only state law claims. *See id.* Nonetheless, the defendants removed the actions to federal court on the grounds that these claims had already been

[3] Two plaintiffs in the *Ivy* litigation alleged injuries stemming from Agent Orange exposure while acting in a civilian capacity, and thus were not members of the class bound by the 1984 settlement. Their claims were severed from the claims of the other plaintiffs. *See Ryan v. Dow Chem. Co. (In re "Agent Orange") Prod. Liab. Litig.*, 781 F.Supp. 902, 914 (E.D.N.Y.1991) ("*Ivy/Hartman I*"); *aff'd sub nom Ivy v. Diamond Shamrock Chem. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 996 F.2d 1425 (2d Cir.1993).

asserted and litigated in federal court. *See id.* at 913. The MDL Panel transferred the actions to Judge Weinstein in the Eastern District of New York. *See Ivy/Hartman II*, 996 F.2d at 1430.

The district court rejected plaintiffs' motion to remand, reasoning that it had jurisdiction over the class action because it "ha[d] authority to ensure that [its prior orders] and the Settlement Agreement [were] enforced," especially given the injunction it issued enjoining all class members from commencing any action arising out of Agent Orange exposure. *Ivy/Hartman I*, 781 F.Supp. at 914, 916. In support of its decision, the district court cited the All-Writs Act, 28 U.S.C. § 1651 (1994), which authorizes writs "necessary or appropriate" in aid of its jurisdiction. *See id.* at 918.

The district court then turned to the plaintiffs' substantive arguments that it was unfair to bind them to the settlement when their injuries were not manifested until after the settlement had been reached. The district court rejected this argument, based on the following reasoning:

> All of the courts which considered the *Agent Orange* Settlement were fully cognizant of the conflict arguments now hypothesized by the plaintiffs and took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund.
>
> In many cases the conflict between the interests of present and future claimants is more imagined than real. In the instant case, for example, the injustice wrought upon the plaintiffs is nonexistent. *These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund.* The relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time.

> Even when it is proper and necessary for the courts to be solicitous of the interests of future claimants, the courts cannot ignore the interests of presently injured plaintiffs as well as defendants in achieving a settlement. Class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability. Making settlement of Rule 23 suits too difficult will work harms upon plaintiffs, defendants, the courts, and the general public.

Id. at 919-20 (emphasis added). The district court therefore dismissed the *Ivy/Hartman* litigation.

We affirmed the district court's dismissal. *Ivy/Hartman II*, 996 F.2d 1425, 1439. We agreed with the district court's assertion [255] of federal jurisdiction under the All Writs Act and held:

> A district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case in order to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained."

Id. at 1431 (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977)).

We then addressed plaintiffs' argument that they were not members of the prior class, because they were not "injured" as the term was used in the class definition. *Id.* at 1433. We concluded that, for the purposes of the Agent Orange litigation, "injury occurs when a deleterious substance enters a person's body, even though its adverse effects are not immediately apparent." *Id.* at 1433-34. We emphasized that the plaintiffs in the original suit had sought to include such "at-risk" plaintiffs, over defendants' objections, and that we had already affirmed the inclusion of these plaintiffs in the class. *See id.*

We likewise rejected plaintiffs' argument that their due process rights were violated because they were denied ade-

quate representation and adequate notice in the prior action. *See id.* at 1435-36. We reasoned that "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good." *Id.* at 1435. We concluded that the plaintiffs were adequately represented in the prior action, and that a subclass of future claimants was unnecessary "'because of the way [the settlement] was structured to cover future claimants.'" *Id.* at 1436 (quoting *Ivy/Hartman I*, 781 F.Supp. at 919)(alteration in original).

Shortly before our decision in *Ivy/Hartman II*, the $10 million set aside for indemnification from state court Agent Orange judgments was transferred to the Class Assistance Program, because the district court deemed such a fund unnecessary. The distribution activities had begun in 1988, and concluded in June 1997. During the ten year period of the settlement, $196.5 million was distributed as cash payments to approximately 52,000 class members. The program paid approximately $52 million to "after-manifested" claimants, whose deaths or disabilities occurred after May 7, 1984. Approximately $71.3 million of the fund was distributed through the Class Assistance Program.

B. *The Instant Litigation*

1. *The Parties*

Daniel Stephenson served in Vietnam from 1965 to 1970, serving both on the ground in Vietnam and as a helicopter pilot in Vietnam. He alleges that he was in regular contact with Agent Orange during that time. On February 19, 1998, he was diagnosed with multiple myeloma, a bone marrow cancer, and has undergone a bone marrow transplant.

Joe Isaacson served in Vietnam from 1968 to 1969 as a crew chief in the Air Force, and worked at a base for airplanes which sprayed various herbicides, including Agent Orange. In 1996, Isaacson was diagnosed with non-Hodgkins lymphoma.

Defendants are chemical manufacturers who produced and sold to the United States Government the herbicide Agent Orange during the Vietnam War.

2. *Proceedings Below*

In August 1998, Isaacson filed suit in New Jersey state court, asserting claims only under state law. Defendants quickly removed the case to federal court and Isaacson's subsequent motion to remand was denied by Chief Judge Anne Thompson in the District of New Jersey. Thereafter, [256] Isaacson's case was transferred to Judge Weinstein by the MDL Panel.

Stephenson filed his suit *pro se* in the Western District of Louisiana in February 1999, but he soon retained his current counsel. In April 1999, defendants moved for and were granted a Conditional Transfer Order by the MDL Panel, transferring this action to Judge Weinstein. After Stephenson's case was transferred, it was consolidated with the Isaacson case.

Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting that plaintiffs' claims were barred by the 1984 class action settlement and subsequent final judgment. Judge Weinstein granted this motion from the bench following argument, rejecting plaintiffs' argument that they were inadequately represented and concluding that plaintiffs' suit was an impermissible collateral attack on the prior settlement.

Because we disagree with this conclusion, based on the Supreme Court's holdings in *Amchem* and *Ortiz*, we must vacate the district court's dismissal and remand for further proceedings.

II. DISCUSSION

"We review a dismissal under Rule 12(b)(6) *de novo*, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiffs' favor." *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 161 (2d Cir.2000).

A. *Removal Jurisdiction*

The Isaacson appellants contend that Isaacson's case should have been remanded for lack of federal jurisdiction. Isaacson initially filed suit in New Jersey state court, alleging only claims under state law. Defendants removed his case to the District of New Jersey, where Isaacson's subsequent motion to remand was denied.

The district court based removal jurisdiction on the All Writs Act, *28 U.S.C. § 1651*,[4] and concluded that the court best suited to determine the settlement's preclusive effect would be the court that approved the settlement. *Ivy/Hartman I*, 781 F.Supp. at 918.

"A district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable ... case in order to 'effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.'" *Ivy/Hartman II*, 996 F.2d at 1431 (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977)). In *Ivy/Hartman II*, we concluded that such exceptional circumstances warranted removal jurisdiction in that case because "[i]f Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the ... settlement mechanism would be substantial." *Id.* Isaacson contends that this case, however, presents no such "exceptional circumstances," because the settlement fund no longer exists.

We disagree. Although the settlement funds are now depleted, maintenance of these actions in state court necessarily requires interpretation of the scope of the Agent Or-

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[4] This section provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

ange Settlement and could have the potential to disturb the judgment underlying the settlement depending on the position taken by defendants. Although we ultimately hold that Isaacson's suit is not precluded by the settlement judgment, removal and transfer were appropriate simply for the purpose of determining the [257] settlement's preclusive effect.[5] Indeed, the court "best situated to make this determination" is the court that entered judgment. *Id.* This conclusion is not altered by our determination that the district court here erred.

B. *Collateral Attack*

The parties devote much energy to debating the permissibility of a collateral attack in this case. Plaintiffs assert that, since the Supreme Court's decision in *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), courts have allowed collateral attacks on class action judgments based upon due process concerns. Defendants strenuously disagree and contend that to allow plaintiffs' suit to go forward, in the face of the 1984 global settlement, would "violate defendants' right to due process of law." Appellees' Br. at 39. Defendants likewise strenuously argue that the district court's injunction against future litigation prevents these appellants from maintaining their actions. While it is true that

[5] In *Ivy/Hartman II*, this Court noted that "[i]t is difficult to conceive of any state court properly addressing a victim's tort claim without first deciding the scope of the *Agent Orange I* class action and settlement." *Ivy/Hartman II*, 996 F.2d at 1431. Whether or not funds from the original settlement pool remained available for these victims, a state court could not consider the merits of the plaintiffs' cases without first deciding whether the original Agent Orange Settlement Agreement addressed (and therefore now precluded) their claims. As we held in *Ivy/Hartman II*, "[t]he court best situated [to determine whether a plaintiff's claim is barred by the original settlement] is the court that approved the settlement and entered [the] judgment enforcing it." *Id.* Although we express no opinion as to whether maintenance of these actions in the state court would actually disturb the settlement, we find the need for interpretation of the settlement and the possibility of such disturbance a sufficient basis for the "extraordinary circumstances" warranting removal under the All Writs Act.

"[a]n injunction must be obeyed until modified or dissolved, and its unconstitutionality is no defense to disobedience," *Met. Opera Ass'n. v. Local 100, Hotel Employees and Rest. Employees Int'l Union*, 239 F.3d 172, 176 (2d Cir.2001) (citing *Walker v. Birmingham*, 388 U.S. 307, 314-21, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967)), defendants' injunction-based argument misses the point. The injunction was part and parcel of the judgment that plaintiffs contend failed to afford them adequate representation. If plaintiffs' inadequate representation allegations prevail, as we so conclude, the judgment, which includes the injunction on which defendants rely, is not binding as to these plaintiffs.

Defendants contend that Supreme Court precedent permits a collateral attack on a class action judgment "only where there has been no prior determination of absent class members' due process rights." Appellees' Br. at 40. According to defendants, because the "due process rights of absent class members have been extensively litigated in the *Agent Orange* litigation," Appellees' Br. at 44, these plaintiffs cannot now attack those prior determinations. We reject defendants' arguments and conclude that plaintiffs' collateral attack, which seeks only to prevent the prior settlement from operating as res judicata to their claims, is permissible.

First, even if, as defendants contend, collateral attack is only permitted where there has been no prior determination of the absent class members' rights, plaintiffs' collateral attack is allowed. It is true that, on direct appeal and in the *Ivy/Hartman* litigation, we previously concluded that there was adequate representation of all class members in the original *Agent Orange* settlement. However, neither this Court nor the district court has addressed [258] specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlements funds. *See Ivy/Hartman II*, 996 F.2d at 1436 (creating a subclass of future claimants was unnecessary because the settlement covered such claimants); *Ivy/Hartman I*, 781 F.Supp. at 919 ("These plaintiffs, like all class members *who suffer*

death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund." (emphasis added.)) Therefore, even accepting defendants' argument, plaintiffs' suit can go forward because there has been no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund.[6]

Second, the propriety of a collateral attack such as this is amply supported by precedent. In *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), the Supreme Court entertained a collateral attack on an Illinois state court class action judgment that purported to bind the plaintiffs. The Court held that class action judgments can only bind absent class members where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation." *Id.* at 41, 61 S.Ct. 115; *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) ("[I]t is true that a court adjudicating a dispute may not be able to predetermine

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[6] Defendants rely heavily on a recent Ninth Circuit decision, *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.1999), in support of their limited collateral review theory. *Epstein* held that a collateral attack is available only "to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." *Id.* at 648-49. According to the Ninth Circuit,

> Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.

Id. at 648. Here, neither the district court nor this Court has determined the adequacy of representation *with respect to these plaintiffs* whose injuries did not arise until after the settlement expired. Without adopting the Ninth Circuit's decision in *Epstein*, we conclude that plaintiffs' collateral attack is proper even under its standard.

the res judicata effect of its own judgment."). Additionally, we have previously stated that a "[j]udgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented." *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n. 15 (2d Cir.1978); *aff'd* 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980).

Allowing plaintiffs' suit would be consistent with many other circuit decisions recognizing the ability of later plaintiffs to attack the adequacy of representation in an earlier class action. For example, the Fifth Circuit holds:

> To answer the question whether the class representative adequately represented the class so that the judgment in the class suit will bind the absent members of the class requires a two-pronged inquiry: (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class? The first question involves us in a *collateral review* of the ... [trial] court's determination to permit the suit to proceed as a class action with [the named plaintiff] as [259] the representative, while the second involves a review of the class representative's conduct of the entire suit--an inquiry which is not required to be made by the trial court but which is appropriate in a collateral attack on the judgment....

Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir.1973); *see also Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266 (7th Cir.1998) (addressing due process considerations of prior class action settlement on collateral attack); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir.1998) ("Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, and

an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process."); *Crawford v. Honig*, 37 F.3d 485, 488 (9th Cir.1994) (finding that when absent class members were not adequately represented in a post- settlement modification of a class-wide injunction, "res judicata did not bar them from collaterally attacking the [modification] proceedings") (citation omitted).

Defendants' citation to *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), is unavailing. According to that case, a "judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." *Id.* at 398, 101 S.Ct. 2424 (alteration in original). Defendants' reliance on this case misperceives plaintiffs' argument. Plaintiffs do not attack the merits or finality of the settlement itself, but instead argue that they were not proper parties to that judgment. If plaintiffs were not proper parties to that judgment, as we conclude below, res judicata cannot defeat their claims. Further, such collateral review would not, as defendants maintain, violate defendants' due process rights by exposing them to double liability. Exposure to liability here is not duplicative if plaintiffs were never proper parties to the prior judgment in the first place.

We therefore hold that a collateral attack to contest the application of res judicata is available. We turn next to the merits of this attack.

C. *Due Process Considerations and Res Judicata*

The doctrine of res judicata dictates that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 n. 6, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). Res judicata ordinarily applies "if the earlier decision was (1)

a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action." *Anaconda-Ericsson Inc. v. Hessen* (*In re Teltronics Servs., Inc.*), 762 F.2d 185, 190 (2d Cir.1985).

Plaintiffs' argument focuses on element number three in the res judicata analysis: whether they are parties bound by the settlement. Plaintiffs rely primarily on the United States Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999).

In *Amchem*, the Supreme Court confronted, on direct appeal, a challenge to class certification for settlement purposes in an asbestos litigation. The class defined in the complaint included both individuals [260] who were presently injured as well as individuals who had only been exposed to asbestos. *Amchem*, 521 U.S. at 602 n. 5, 117 S.Ct. 2231. The Supreme Court held that this "sprawling" class was improperly certified under Federal Rules of Civil Procedure 23(a) and (b). *Id.* at 622-28, 117 S.Ct. 2231. Specifically, the Court held that Rule 23(a)(4)'s requirement that the named parties "'will fairly and adequately protect the interests of the class'" had not been satisfied. *Id.* at 625-26, 117 S.Ct. 2231. The Court reasoned that

> named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure- only plaintiffs in ensuring an ample, inflation-protected fund for the future.

Id. at 626, 117 S.Ct. 2231.

Amchem also implied, but did not decide, that the notice provided to exposure-only class members was likewise inadequate. The Court stated that, because many exposure-only individuals, may not be aware of their exposure or realize the ramifications of exposure, "those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Id.* at 627, 117 S.Ct. 2231.

In *Ortiz*, the Supreme Court again addressed a settlement-only class action in the asbestos litigation context. *Ortiz*, however, involved a settlement- only limited fund class under Rule 23(b)(1)(B). The Supreme Court ultimately held that the class could not be maintained under Rule 23(b)(1)(B), because "the limit of the fund was determined by treating the settlement agreement as dispositive, an error magnified" by conflicted counsel. *Ortiz*, 527 U.S. at 864, 119 S.Ct. 2295. In so holding, *Ortiz* noted that "it is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." *Id.* at 856, 119 S.Ct. 2295.

Res judicata generally applies to bind absent class members except where to do so would violate due process. *Gonzales*, 474 F.2d at 74. Due process requires adequate representation "at all times" throughout the litigation, notice "reasonably calculated ... to apprise interested parties of the pendency of the action," and an opportunity to opt out. *Shutts*, 472 U.S. at 811-12, 105 S.Ct. 2965.

Both Stephenson and Isaacson fall within the class definition of the prior litigation: they served in the United States military, stationed in Vietnam, between 1961 and 1972, and were allegedly injured by exposure to Agent Orange. However, they both learned of their allegedly Agent Orange- related injuries only after the 1984 settlement fund had expired

in 1994. Because the prior litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994, the conflict between Stephenson and Isaacson and the class representatives becomes apparent.[7] No provision was made for post-[261] 1994 claimants, and the settlement fund was permitted to terminate in 1994. *Amchem* and *Ortiz* suggest that Stephenson and Isaacson were not adequately represented in the prior Agent Orange litigation.[8] Those cases indicate that a class which purports to represent both present and future claimants may encounter internal conflicts.[9]

Defendants contend that there was, in fact, no conflict because all class members' claims were equally meritless and

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[7] Again, we distinguish the *Ivy/Hartman* cases, which held that pre 1994 claimants were adequately represented in the prior Agent Orange litigation. This conclusion was based, at least in part, on those claimants' eligibility for compensation from the settlement fund. *See Ivy/Hartman I*, 781 F.Supp. at 919; *Ivy/Hartman II*, 996 F.2d at 1435- 36.

[8] We also note that plaintiffs likely received inadequate notice. *Shutts* provides that adequate notice is necessary to bind absent class members. *Shutts*, 472 U.S. at 812, 105 S.Ct. 2965. As described earlier, *Amchem* indicates that effective notice could likely not ever be given to exposure-only class members. *Amchem*, 521 U.S. at 628, 117 S.Ct. 2231. Because we have already concluded that these plaintiffs were inadequately represented, and thus were not proper parties to the prior litigation, we need not definitively decide whether notice was adequate.

[9] Both *Amchem* and *Ortiz* addressed the possibility of internal conflicts in the limited context of settlement-only classes. For such certifications, *Amchem* held that internal conflicts would prevent adequate representation when the named plaintiffs (having present injuries) did not act with "a proper understanding of their representational responsibilities" towards class members whose injuries would surface later. *Amchem*, 521 U.S. at 627-28, 117 S.Ct. 2231. *Ortiz*, while recognizing the need for some limit to "reclassification with separate counsel," found that because of the lack of procedural safeguards like subclasses in the *Ortiz* certification, the settlement-only class presented could not adequately protect included future plaintiffs. *Ortiz*, 527 U.S. at 855-57, 864-65, 119 S.Ct. 2295 (noting that the application of Rule 23(b)(1)(B) to a plan addressing actual and potential tort claims is "subject to question").

would have been defeated by the "military contractor" defense. This argument misses the mark. At this stage, we are only addressing whether plaintiffs' claims should be barred by res judicata. We are therefore concerned only with whether they were afforded due process in the earlier litigation. Part of the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts. The ultimate merits of the claims have no bearing on whether the class previously certified adequately represented these plaintiffs.

Because these plaintiffs were inadequately represented in the prior litigation, they were not proper parties and cannot be bound by the settlement. We therefore must vacate the district court's dismissal and remand for further proceedings. We, of course, express no opinion as to the ultimate merits of plaintiffs' claims.

III. CONCLUSION

For the foregoing reasons, we hold that the prior *Agent Orange* settlement does not preclude these plaintiffs from asserting their claims alleging injury due to Agent Orange exposure. Because these plaintiffs were inadequately represented in the prior litigation, based on the Supreme Court's teaching in *Amchem* and *Ortiz*, they were not proper parties to the litigation. We therefore vacate the district court's dismissal and remand the case to the district court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

[ROSEANN B. MACKECHNIE, CLERK Letterhead]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of May two thousand two.

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON EMILY ELIZABETH STEPHENSON, JOE ISAACSON AND PHYLLIS LISA ISAACSON,
Plaintiffs-Appellants,

v.

DOW CHEMICAL CO., MONSANTO CO., AMERICAN HOME PRODUCTS, INC., HERCULES INCORPORATED, OCCIDENTAL CHEMICAL CORPORATION, ULTRAMAR DIAMOND, CHEMICAL LAND HOLDINGS, INC., MAXUS ENERGY CORP., HARCROS CHEMICAL INC., SHAMROCK CORP., AND DOES 1-100, THOMPSON HAYWARD CHEMICAL CO., T-H AGRICULTURE & NUTRITION CO., INC., UNIROYAL, INC. and C.D.U. HOLDING, INC., UNIROYAL CHEMICAL Co.,
Defendants-Appellees.

00-7455
[FILED: May 8, 2002]

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Dow Chemical Co.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller,
Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Michael F. Ryan, et al., Plaintiffs
-against-
Dow Chemical Company, et al., Defendants.

---

79 CV 747 (JBW)

IN RE:
"Agent Orange" Product Liability Litigation

MDL NO. 381

Joe Isaacson and Phillis Lisa Isaacson, Plaintiffs
-against-
Dow Chemical Company, et al., Defendants.

Civ. No. 98-6383 (JBW)

Daniel Raymond Stephenson, et al., Plaintiffs
-against-
Dow Chemical Company, et al., Defendants

Civ. No. 99-3056 (JBW)

ORDER AND JUDGMENT

The Court heard argument on defendants' motion to dismiss in the above-captioned actions on December 13, 1999. A copy of the transcript of proceedings is attached

hereto. Upon consideration of that argument and all pleadings, motions, proceedings, and the full record in MDL-381 and in the above-captioned actions, it is hereby **ORDERED** that defendants' motion to dismiss is **GRANTED**; and **IT IS FURTHER ORDERED** that the complaints and any and all amendments thereto filed in *Isaacson v. Dow Chemical Company, et al.*, Civ. No. 98-6383 (JBW) and *Stephenson v. Dow Chemical Company, et al.*, Civ. No. 99-3056 (JBW), shall be dismissed as against all defendants with prejudice and without costs assessed to any party.

Dated: April 7, 2000

/s/ [STAMP]
Hon. Jack B. Weinstein

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Daniel Raymond Stephenson, Plaintiff,

versus

Dow Chemical Company, et al., Defendants

Civ. No. 99-3056 (JBW)
[ENTERED: April 3, 2000]

ORDER AND JUDGMENT

The Court heard argument on defendants' motion to dismiss in the above-captioned matter on December 13, 1999. A copy of the transcript of proceedings is available. Upon consideration of that argument and all pleadings, motions, proceedings, it is hereby **ORDERED** that defendants' motion to dismiss is **granted**; and

IT IS FURTHER ORDERED that the complaint and any and all amendments thereto filed in *Stephenson v. Dow Chemical Company, et al.*, Civ. No. 99-3056 (JBW), shall be dismissed as against all defendants with prejudice and without costs assessed to any party.

Signed this 27th day of March, 2000.

/s/ [STAMP]
Honorable Jack B. Weinstein

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Joe Isaacson, Daniel Stephenson, Plaintiffs

v.

Dow Chemical Co., et al., Defendants

CV 98-6380

CV99-3065

United States Courthouse
Brooklyn, New York

December 13, 1999
10:15 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

* * * *

(In chambers.)

MR. SMOGER: I am Gerson Smoger, on behalf of plaintiff Joe Isaacson. Joe Isaacson is here.

If it's okay with your Honor, the national director of the Vietnam Veterans of America, George Claxton, is sitting there. There is the vice director, vice chair of the Vietnam Veterans of America, Paul Sutton, and Bernie McElvay, the director of Vietnam Veterans of America from New Jersey.

Also here is Esther Barezofsky, my co-counsel in the Isaacson matter.

THE COURT: Would you open that door. This is a public hearing.

MR. MURRAY: Stephen Murray, Junior, for Dan Stephenson and his family.

MR. BROCK: Steven Brock for Dow Chemical Company.

MR. KROHLEY: William Krohley for Hercules.

MR. KALISH: Myron Kalish for Uniroyal.

MR. SABETTA: John Sabetta for Monsanto Company.

MR. D'ALOISE: Lawrence T. D'Aloise, Junior for T. H. Agriculture and Nutrition Co.

MR. GORDON: Michael Gordon for Occidental Chemical Corporation, as successor to Diamond Shamrock Chemical Companies.

THE COURT: Sorry we have to have this in chambers. I hope you're all comfortable. The courtroom is being used because of an overflow in connection with a sentencing this morning.

I'll be happy to hear everybody.

MR. BROCK: It is our motion to dismiss both as to the Isaacson and Stephenson cases.

As you know, based on the two prior decisions of the Court of Appeals addressing very much the same issues, the motion involves res judicata. Plaintiffs concede that res judicata generally applies even if the prior decisions were wrong or if there had been a change of law, matters we don't think apply here.

But given the circumstances -- the court is familiar with the case, I'm not going to go through all that in detail -- that we have had two complete reviews of very much the same issues, whether the class actions are entitled to res judicata, by the Supreme Court, the matters that they raise suggesting

that there is some difference here with the fact that the veterans payment program under the prior Agent Orange settlement ended in 1995; that is a matter that has been known, based on your Honor's decision, back when the last two decisions of the Courts of Appeals affirmed that the class bound future claimants -- it is not something that is new.

The Second Circuit, in the Addington case, one of the cases involving challenges to specific payments under the settlement distribution plan, said that it was too late to challenge the distribution plan at this point.

Other factors that would indicate that that can't be taken into consideration are the fact that the plan was not agreed to by the class representatives. That distinguishes this from a lot of other cases in which the class representatives negotiated a particular settlement agreement and allocation, perhaps, between future and current claimants.

In this case, the settlement was agreed upon without any such allocation, and this court determined the allocation method, which was affirmed on appeal. Under those circumstances there is not any suggestion that differences in representation would have affected or would apply in the same way that they might when the class representatives actually negotiated allocations of funds between different categories of plaintiffs.

Plaintiffs also ignore the fact that the class assistance program provided lasting benefits for all the class members and suggest simply because if they didn't have an opportunity to apply for individual payments under the veterans payment program that they got nothing.

I think the court envisioned that all the claims at issue, both current and future, were essentially without merit because of the difficulties with causation and with the strength of the government contract advance. So there is no real variation in interest, in actual interest with any conflict in this case that those subclasses are not required. I think that continues to be the law of the case.

The cases all look to an actual conflict of interest on the facts. There might often be, as this court has considered in the past, conflicts between future and current claimants, but in this particular case there were not. So the court's decision remains solid.

In the Isaacson case, they suggest that non-Hodgkin's lymphoma deserves special consideration and deserves special payment. Those sorts of issues, again, were considered in the last two cases. They have already been addressed. The court has considered the causation evidence, and also considered the possibility that the scientific studies might change in the future, when it reached its prior decisions.

The ten million dollar reserve that was released on the court's motion, which would have protected defendants at least against the Isaacson claim if it were still in existence, that was premised on the finality of the Ivy-Hartman case. It was lifted based on the understanding that preclusion would apply to future claimants under that decision and that an injunction would prevent litigation and relitigation and any further judgments, therefore the reserve was no longer necessary.

I think at this point, having let go the reserve, there is significant due process interests of the defendants in the balance of being subject to double liability in a situation such as this.

The law of collateral attack, which plaintiffs apparently assert gives them an unlimited right to litigate one by one with all the remaining outstanding class members, is not so open-ended.

We have addressed in our papers a number of the cases that indicate various appropriate limits on it, including the most recent case of the Ninth Circuit in Epstein, interpreting the Supreme Court's decision in Matsushita, which suggests that the main assurance of fairness of adequate representation should be in the initial court and on direct review of that decision, and that a collateral review should be limited just to

determine that in fact the initial court did consider the issue and did not overlook it. Under that standard, the plaintiffs have already had far more due process than the minimum they would be required.

We have identified a number of other law and policy authority which would support limiting collateral attack in a number of ways. Rather than go into them all here, I would simply direct your Honor to one distinguishing factor in this case, which is the extension of an injunction barring future suits.

There is not any question under the Supreme Court authorities that there is no collateral attack on an injunction. An injunction has nationwide scope. It has to be challenged in the court that issued it. It may not be collaterally attacked even if the injunction is unconstitutional, as the plaintiffs allege here.

In those circumstances, this court has ample additional authority specific to the particular circumstances of this case to direct and consider and not allow any attacks -- further collateral attacks, I should say -- given that there have already been one full litigation and a full collateral attack on exactly these issues that have been raised here.

Absent any further questions of the court, and subject to what response I might have to what plaintiffs say, I believe the case is properly dismissed at this point.

THE COURT: Does any other defendant wish to address the court?

All right, I will hear from plaintiffs.

MR. SMOGER: I will start with the idea of whether we can be here at all in terms of a collateral attack. The cases cited by the defendants jointly on the collateral attack issue were all Delaware cases and operated under Delaware state law. They all had personal jurisdiction, but it was found that the stock ownership were Delaware corporations and people owned stock in Delaware.

Delaware state law is peculiar because it doesn't allow for collateral attack, but collateral attack is clearly the law of the federal courts and the law of almost every other state court.

So they have interpreted Delaware law, and even then they carved out a narrow exception in full faith and credit to Delaware law where they said we can't look at the substantive due process or the substance of the decision, but we're still going to look at the procedure.

I think that is peculiar. In fact, Release Oil, which was a Texas case, specifically says that we're dealing with Alabama law, and since Alabama law looks at collateral attack, we will look at collateral attack.

So that gets to whether you can look at this at all, and I think the defendants in their brief, I think they correctly -- this is a quote from their brief. It says, res judicata can only proceed under narrow exceptions -- this is the reply brief -- such as the lack of due process in the prior ruling, which is to be found on page 13 of the defendants' reply brief.

That is correct. So that I think we get to the core question here, the core question whether the prior rulings and the prior holding, as it stands now -- and this is a different case than before -- as we stand here today, is due process met?

We have some benefits that didn't exist before. We have the Supreme Court's pronouncements in both Amchem and Ortiz. In looking at them, one of the things about those settlements is here we're dealing with the ten year --

THE COURT: Those were on direct appeal --

MR. SMOGER: Yes.

THE COURT: -- not collateral.

MR. SMOGER: Absolutely. They were not collateral. But Hornsbury versus Lee was a collateral attack, and that was incorporated in the 1966 amendments, and the vast majority of attacks in the federal courts on class actions have been collateral attacks.

I understand that Amchem itself -- and I'm not using it to say that Amchem itself says anything about a collateral attack, what it does talk about is the requirement of adequate representation.

I'm moving over to the adequate representation issues because I think that if we can have a collateral attack then we are talking about the due process issues, and two issues come up. One is adequate representation and the other one is notice.

I want to deal with notice briefly, first. It's peculiar because I think notice is the one thing that was clearly discussed both by your Honor previously and by the Second Circuit. However, in both of the decisions there was -- and it's almost to the line -- the Second Circuit said that when you look at notice itself, you have to look at the overriding needs of the class above the individual needs.

The Supreme Court actually cited the Agent Orange cases, saying we don't look at that, that that is a fairness issue, but that's not a predicate issue for the class, and the predicate issue is, is due process met?

They said it's wonderful -- I mean, that was Breyer's dissent, that we really need a legislative solution, but the Supreme Court said we can't look to a legislative solution, we have to look at the fact is due process met for the individual. And the reason I bring up notice is the Supreme Court, I think, has said that individual notice is required, if it can be done.

We think that there was a good chance that Joe Isaacson could have gotten individual notice. I understand that your Honor said it was very difficult with the military as it stood at that time to give generalized notice, but there are some military people that could have gotten individual notice, but he wasn't on the registry.

So we think that that is an issue, though I'm not going to say that it wasn't addressed by your Honor and the Second Circuit.

What was not addressed, and I think the defendants miss -- I don't think they understand the thrust of our brief is that we think that there was a subclass of post 1994/1995 individuals that was separate and apart from the individuals that were addressed by Ryan and Ivy.

It was well stated, both by your Honor and the Second Circuit, that Ivy and Ryan stood in the exact same shoes as anybody that had a contemporary injury. That, however, is not true of Joe Isaacson because anybody that suffers the exact same injury or has --

THE COURT: You don't mean injury, you mean awareness of injury. Injury occurs at the time of the spraying, the awareness occurs later.

So you're relying upon awareness?

MR. SMOGER: I'm relying on the discovery rule, yes. And if the discovery rule is in 1996, I mean, obviously, Mr. Isaacson did not have non-Hodgkin's lymphoma until 1996, so he had no ability to be a participant in the pre-1994 settlement.

So by the terms of the settlement when it was established, anybody that had the exact same injury, or would have been entitled to compensation before 1994, is not entitled to compensation when the funds run out, which we think is a separate subclass.

Even in Amchem they had a ten-year period for the settlement, with a re-upping of the settlement subject to the defendants after it closed at ten years, with a joint recognition of whether you wanted to go into the future.

In this case the funds are gone and the defendants are saying, well, the funds are gone. There is no re-upping it's gone, and there's no entitlement to any funds at all.

We think that Mr. Isaacson has an injury. He's entitled to a personal, individual remedy for that injury and the remedy is gone; therefore, he should be allowed to proceed.

THE COURT: Does the other plaintiff's representative wish to be heard?

MR. MURRAY: I would join in the remarks of Mr. Smoger and just also point out that the conflict that is at the heart of Amchem exists every bit as much in this case as it did in Amchem, which is that with regard to post 1994 injuries there's a conflict as to compensation versus utter lack of compensation, and nothing that came later in Ortiz, in the reply brief that Mr. Brock --

THE COURT: I don't understand your point. Were people compensated who found out about their injury post judgment in this case?

MR. MURRAY: Your Honor, my point is that --

THE COURT: Isn't that so?

MR. MURRAY: Yes, there were. But they were at least participants in the fund. I would submit that under Amchem they would -- people who had a post 1984 post settlement injury would likewise have had a conflict, but this court and the Second Circuit felt that that conflict was de minimus because the people were equally treated under the settlement.

THE COURT: I really don't understand your point at the moment, your factual point. I don't say that critically.

People were compensated who found out about their injury post 1994, correct?

MR. MURRAY: In the instant case?

THE COURT: Yes.

MR. MURRAY: I don't believe so, your Honor.

THE COURT: You don't believe so?

MR. SMOGER: Post 1984. I think you said post 1994.

THE COURT: '84, post '84, yes.

MR. MURRAY: Correct.

THE COURT: Post judgment.

MR. MURRAY: Yes.

THE COURT: People who found out about their injuries later were compensated.

MR. MURRAY: However, there's a conflict between anyone who found out about their injury post 1994 versus someone who found out about their injury pre-1994.

THE COURT: What is the 1994 cut-off? What is the significance of that?

MR. MURRAY: Those persons are not entitled to any compensation under the settlement whatsoever.

THE COURT: Because?

MR. MURRAY: Because the settlement fund has been exhausted and has reverted back to the -- under the plan the ten million dollars is reverted out of the settlement.

THE COURT: Reverted back to whom?

MR. MURRAY: I believe that your Honor reverted -- allocated the ten million dollars in funds to veterans' benefits program.

THE COURT: That's right. All the funds have been expended except for some three hundred thousand dollars, which will go to the veterans legal organization. All the residual amount will be expended on behalf of the veterans and their families.

I don't understand what your point is from a legal standpoint. There are no funds at the moment except for the residual amount of about three hundred thousand, as I understand it, which will go to the veterans group.

Would you ask my secretary to give you a copy -- get a half dozen copies of the final report and that orange legal document that goes to all veterans who apply now.

I want to get your factual contentions straight because I don't quite understand it. Are you contending now that your client found out about his injury after all the money had been expended that was available, is that your point?

MR. MURRAY: Yes, your Honor.

THE COURT: Okay.

MR. MURRAY: And there would be a conflict between someone such as my client and a class representative who either found out -- who knew of his injury at the time of the settlement, under Amchem.

THE COURT: At the time of the settlement or post settlement when there were funds being expended?

MR. MURRAY: Your Honor, there --

THE COURT: There were thousands and thousands of cases of people who found out later and were compensated for their own injuries -- pass those out -- this is the final report. Have you seen the final report --

MR. MURRAY: No, your Honor.

THE COURT: -- in this case?

MR. BROCK: It was attached --

THE COURT: Mark it as a document and give it to counsel so they understand what the factual predicate is.

Do you representatives of the veterans organizations want to see this report? Have you seen it? Give out those copies and give out those orange reports which explain to the veterans what their present rights are for compensation.

A great deal of the money was given to the legal organizations, which, on behalf of the veterans, acted to get necessary legislation and Veterans Administration rulings to take care of just exactly the situation you're raising -- that is for people who are now suffering injuries which the government has recognized it is its primary duty to compensate.

Where are those orange pamphlets?

(Pause.)

THE COURT: So I'm not quite clear that I understand your position, your posture. I'm trying to state it for the record.

Is it your posture that those who can no longer be compensated by court funds, because effectively the time to apply

for court funds has expired, were not represented adequately in the original hearings?

MR. MURRAY: Correct, your Honor.

THE COURT: And for that reason they were denied due process?

MR. MURRAY: Yes, your Honor.

THE COURT: Okay. Is that your position, too?

MR. SMOGER: Basically.

THE COURT: What is the difference? I want to get it exactly.

MR. SMOGER: The position is that those people -- that there's a separate subclass established at the very outset for post -- people that got injury before 1994 and people who had injury after 1994.

I think your Honor phrased it in the sense of whether they could apply. Certainly, if somebody could fit in within the class of 1993 but hadn't applied until 1996, then there is the argument that that is consistent with the rulings in Ryan and consistent in Ivy.

The question is, since they had no ability to apply before --

THE COURT: Because they didn't know?

MR. SMOGER: Because they hadn't been diagnosed --

THE COURT: I don't see the difference between your point and co-counsel's point.

MR. SMOGER: Then the subsequent point that we think Amchem requires is that that subclass be given separate representation, and that's the hallmark ruling of both Amchem and Ortiz, because they are treated differently by the settlement iself than those people who could have applied before 1994.

THE COURT: I'm not going to debate those cases. I have given a lot of study to those cases and they don't hold.

I think, what you say they do. But assuming they do, I don't think you make out any case, respectfully.

There was a very full set of hearings throughout the nation to determine the fairness of the Agent Orange settlement. I remind you that at the time of that settlement the epidemiological evidence did not support any finding for the veterans. There was no proof available indicating, to the degree required in a court proceeding -- I'm not talking about an administrative proceeding, or what Congress says, or what anybody else says about the probabilities of causation -- at that time there was no proof that there was sufficient epidemiological, animal study, or any other evidence, including continuing studies of the veterans themselves and of their children -- I won't rehearse the many studies, they are all on file in this court -- that would permit the case to go forward, and the case would have had to be dismissed, with the veterans getting nothing at all, based upon the law then in effect, and the law still in effect, with respect to probabilities and the necessity of proof.

Had there been no settlement, there would have been no recovery for the veterans. The proposed recovery was thoroughly rehearsed in hearings at which all veterans and their organizations were invited to and did attend.

After those hearings, the court held discussions with all attorneys and anyone else who wished to be heard, those who knew they were sick, those who thought they might be sick in the future, those who thought that they might not have children because they were affected, or their children might be affected, and the like.

The court then approved the settlement. It was appealed to the Court of Appeals, which approved the settlement. That is the final decision. Whether right or wrong at that time, that is the end of the case.

A collateral attack of this kind, based upon the law, as I understand it, which is still very unclear, is not permissible. There is nothing in your papers -- and I don't say this with

any criticism -- obviously, you have done a very fine job on behalf of your clients -- that suggests that any of the decisions made originally were invalid or inappropriate.

The decisions that have been made by Congress were made upon probabilities that are not recognized by the courts in a case of this kind.

So nothing has changed. There is no reason to reopen these cases on the merits. There is no reason to reopen them as a matter of law.

Congress has stepped in and taken legislative control of the matter. You see that discussed in those orange pamphlets, which indicate what the rights of the veterans and their families are. So even now, and for a considerable time in the future, because of the legal representation given to those who claim they are suffering from Agent Orange -- and I have a great deal of sympathy, obviously, for them, as a veteran myself -- still have access to some of those funds indirectly.

I'm not going to reopen this case at this point. There has to be some final settlement and some calling to an end of litigation. This litigation has gone on for an awfully long time, and that is particularly true in this case because Congress has stepped in and taken control.

There is no legal basis that I know of at this point in this case to set aside those original agreements. If you could move always to set aside these things, you'd never get any settlement in these cases, defendants would never put any money into these cases.

You have to attack directly, not by a collateral attack some fifteen years after judgment. I just don't see it. I've read your papers. I don't see that there is any basis for this attack.

I won't charge you with any costs and disbursements, obviously, since there are veterans and veterans' organizations involved. You can take an appeal if you wish. I'm not going to write another opinion. You can agree to an order --

I think you can -- just a simple order of dismissal for reasons stated orally on the record.

Do you want to say anything further?

MR. SMOGER: I wanted to just say that I think that that was the argument of the future. I think there is a desire for finality, but I think it was recognized in Ortiz and in Amchem, even when they came to the settlement, that there couldn't be finality and in most of the settlements now there is back-end opt outs.

THE COURT: This is fifteen years after the event. Class actions have come a long way. This was settled. It was the first major settlement where now some three hundred million dollars have been expended on behalf of the veterans and their families, and now to come back fifteen years after the event and say if this case were pending now it might be handled differently doesn't strike me as very persuasive.

In addition to which, I suggest to you that even if it were started today, there would be no recovery whatsoever in these cases based on Daubert and the Supreme Court's very clear findings with respect to what kind of scientific proof that is required.

Your clients, I think, should be told -- I don't criticize you again -- that the standards before a court are different from the standards before Congress and before administrative agencies.

You have submitted no proof whatsoever that a preponderance of the evidence can be adduced with respect to any of these injuries to the veterans or to their children. I remind you, too, that the first children and families who were ever compensated in connection with these matters was because of the funds that were expended by this court, which ultimately led to the spina bifida rulings. That was a major change and also a help to the families.

June, get a set of those reports that we made to the nation as a whole, the bound volumes on the shelf.

The Agent Orange funds were used to train people all over the country on how these matters should be handled. Every veteran, including the Gulf War veterans, benefited from these funds.

MR. SMOGER: Your Honor, the --

THE COURT: I took the very broadest view in order to give the veterans and their families the maximum protection. I don't really see that there is any fundamental basis for re-opening. These are just one of the things that we did to train people -- this is a 1994 national symposium -- relied on all over the world on how veterans and their families should be treated.

Hand them out to whoever got the other.

The Veteran's Administration and Congress people themselves attended, and that's one of the reasons why you got all this legislation.

MR. SMOGER: Your Honor, I might be here in two different places. I was the attorney for Admiral Zimwald, so I know these materials. But right now I'm only here on behalf of Joe Isaacson.

When we talk about the future, and we talk about the specifics, I recognize that some of the conditions at the Veteran's Administration have a lower standard, however, as to certain things -- and the reason we're here particularly on Joe Isaacson is the non-Hodgkin's lymphoma. The literature is very strong in terms of that, and I think we would survive a Daubert challenge.

THE COURT: That is possible. I tried to keep current with all the scientific studies, including those proffered by Admiral Zimwald, whom I greatly respect -- hand those out to those people who got the other material -- but I don't think that it affects this case.

MR. SMOGER: I think the point of what the Supreme Court was saying is as to the future, and the point for Mr. Isaacson is Mr. Isaacson would never have brought a suit,

had no reason to bring a suit, and I know that your Honor did the best he could, that could possibly be done at the time --

THE COURT: That is not true. Excuse me. What you just said is not true. In the asbestos cases, the asbestos future claimants were protected in the class actions, the bankruptcy action, the Johns-Manville action, even though they didn't know what their diseases might be.

It may be that the original suit could have been handled differently, but at this stage it seems to me there is no basis for reopening.

Hasn't your client applied for federal funds?

MR. SMOGER: Yes.

THE COURT: Is he getting Veteran's Administration --

MR. SMOGER: He's getting funds from the government that the government should be entitled to recover from these defendants, and the government would be subject to a lien. Just as asbestos claimants, when they get Medicare, the entire amount has to be reimbursed to the government by statute. We think it should be no different here.

THE COURT: Well, that may well be. The government will have to prosecute that if they think they have a cause of action. I am cognizant of the very fine way you've handled the case, but I'm not going to permit it to go on in this court, so submit a judgment. Try to agree on the terms. If you can't within forty-eight hours, submit contrary judgments and take it up on appeal. If I am wrong, the Court of Appeals will rectify that, or the Supreme Court will. I am perfectly willing to learn. Anybody else wish to be heard?

MR. SMOGER: Thank you for your time, your Honor.

THE COURT: It is my pleasure always to see you.

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APPENDIX F

United States District Court,
E.D. New York.

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

MDL No. 381.

Dec. 16, 1983.

[100 F.R.D. 718]

MEMORANDUM AND PRETRIAL ORDER

WEINSTEIN, Chief Judge:

Plaintiffs, Vietnam War veterans and members of their families, claim to have suffered damages as a result of the veterans' exposure to herbicides in Vietnam. Defendants allegedly produced these herbicides.

Some years ago this court ruled that the litigation would proceed as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. *In re Agent Orange Product Liability Litigation*, 506 F.Supp. 762, 787 ff. (E.D.N.Y.1980). No certification order was, however, entered. The court noted that later stages of this litigation, especially those concerned with individual causation and damages, "may require reconsideration" of the certification. *Id.* at 790. Those later stages have now been reached.

The questions to be decided are whether the class should be certified, which of the types of classes described by Rule 23 should be utilized, how the class should be described, and for what issues. For the reasons indicated below, the class is certified for all issues under 23(b)(3), and on the issue of punitive damages under 23(b)(1)(B). This certification requires

a number of decisions on the mechanics of notice described in the following discussion.

INTRODUCTION

Plaintiffs have increasingly sought to use class actions to redress injuries caused by a single product manufactured for widespread use. A number of courts have seen the class action as the only alternative "to trying ... virtually identical lawsuits, one-by-one," resulting in the "bankruptcy of both the state and federal court systems." Williams, Mass Tort Class Actions, 98 F.R.D. 323, 324 (1983). Three factors in the instant litigation make the desirability of class certification even greater than it would be in most mass tort litigation.

The first is size. The potential size of plaintiffs' class in this litigation numbers in the tens of thousands. If the claims are dealt with individually, the result might "result in a tedium of repetition lasting well into the next century." *In re No. Dist. of Cal. "Dalkon Shield" IUD Product Liability Litigation*, 526 F.Supp. 887 (N.D.Cal.), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins v. Abed*, -- - U.S. ----, 103 S. Ct. 817, 74 L.Ed.2d 1015 (1983). By way of contrast, there were only several hundred plaintiffs in the class certified by the district court in *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D.Mo.), *vacated*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied sub nom. Johnson v. Stover*, 459 U.S. 988, 103 S.Ct. 342, 74 L.Ed.2d 383 (1983)and less than 4,000 in the *"Dalkon Shield"* litigation.

Second is the need to assure that the financial burden will ultimately fall on the party which, it may be found, should as a [721] matter of fairness bear it. As this court pointed out:

> Overarching the entire dispute is a feeling on both sides that whatever existing law and procedures may technically require, fairness, justice and equity in this unprecedented controversy demand that the government assume responsibility for the harm

> caused our soldiers and their families by its use of Agent Orange in Southeast Asia.

In re Agent Orange Product Liability Litigation, 506 F.Supp. 762, 784 (E.D.N.Y. 1980). A class action is the best vehicle for achieving that end. A single class-wide determination on the issue of causation will focus the attention of Congress, the Executive branch and the Veterans Administration on their responsibility, if any, in this case. By contrast, possibly conflicting determinations made over many years by different juries make it less likely that appropriate authorities and the parties will arrive at a fair allocation of the financial burden, if any.

Third, certification may encourage settlement of the litigation. In a situation where there are potentially tens of thousands of plaintiffs, the defendants may naturally be reluctant to settle with individual claimants on a piecemeal basis.

LAW

Rule 23(a) contains four prerequisites to the maintenance of a class action. They are:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims ... of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The four prerequisites as they applied to this litigation have already been carefully analyzed by the court and found to exist. *See In re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762, 787 (E.D.N.Y. 1980). Present as well as prior counsel for plaintiffs appear adequate to their complex task. The only matter on which further elaboration is needed is the second prerequisite, the requirement that there be "questions of law or fact common to the class." Discussion of this point will be combined with a discussion of Rule 23(b)(3).

Rule 23(b)(3)

Rule 23(b)(3) states that if the four prerequisites of 23(a) are met, the class will be certified if, in addition, the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Thus, the issues to be decided are (1) do questions of law or fact common to the class predominate over any questions affecting only individual members, and (2) is a class action the best method for resolution of the litigation.

This court's prior finding that the government contract defense and the affirmative defense of misuse are common to the class is not contested by the parties. Defendants strongly contend, however, that the heart of any product liability claim, causation, can never be common to the class since each veteran, spouse and offspring who has instituted a lawsuit claiming direct or derivative injuries from the veteran's exposure to Agent Orange brings to this case a unique history upon which his or her claim for damages is predicated. Each veteran was exposed, if at all, at different times, at different places and under different circumstances. Therefore, the argument continues, a determination on the issue of causation, whether made as a finding of general causation or as a result of a finding in "test" cases, can never be dispositive of the claims of the other class members and as a result common questions do not "predominate."

Defendants support their argument by citing the Advisory Committee's Notes on Rule 23 and a number of recent cases that have denied (b)(3) certification in mass tort cases. *See, e.g., In re No. [722] Dist. of Cal. "Dalkon Shield" IUD Product Liability Litigation,* 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins v. Abed,* --- U.S. ----, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983); *Payton v. Abbott Labs*, 100 F.R.D. 336 (D. Mass. 1983) (DES Claims); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78 (M.D.Pa. 1974) (county residents seeking damages for air pollution); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (employees of asbestos plant).

Without setting forth the details and analysis of each case, it is fair to say that the reasoning of all of the cases they rely upon is the same as that of the Advisory Committee and is supportive of defendants' reasoning. The drafters' notes state:

> A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class certification because of the likelihood that significant questions not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action nominally conducted as a class action would degenerate in practice into multiple lawsuits separately tried.

Advisory Committee Notes to Proposed Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966). The defendants insist that the Agent Orange situation is even worse in that the focus of the litigation is not a "mass accident," but a mass products liability based upon a series of discrete events.

Following defendants' analysis, the District Court in Texas, in denying certification of a (b)(3) class consisting of all former employees and survivors of former employees of the defendant's asbestos plant, stated that the litigation is very different from the single mass accident cases that have in the past allowed a class action to proceed on the liability issues. Those cases have normally involved a single tragic happening which caused physical harm or property damage to a group of people, and affirmative defenses are absent. Usually, one set of operative facts will establish liability ... The Court is in agreement with the defendant that there is not a single act of negligence or proximate cause which would apply to each potential class member and each defendant in this case.

Yandle v. PPG Indusries, Inc., 65 F.R.D. 566, 571 (E.D. Tex. 1974). Similarly, the District Court of New Hampshire denied (b)(3) certification to a class consisting of all New Hampshire women claiming injury from DES. Plaintiffs sought a blanket determination that DES causes injury *in utero*. The court stated that "such a determination [would] do nothing to advance the cause of class members as a group." *Mertens v. Abbott Laboratories*, 99 F.R.D. 38 at 41 (D.N.H. 1983). If the class is certified, defendants suggest that the certification and class trial should be limited to the only issue which they see as common to the entire class, that is, the government contract defense.

The force of the defense contention is substantial since commonality is critical to certification. Nevertheless, it is not conclusive. In deciding whether common questions predominate, a pragmatic evaluation of the interest of the class members is given great weight. As Professors Wright and Miller put it:

> In general, a Rule 23(b)(3) action is appropriate whenever the actual interests of the parties can be served best by a single action.... [T]he proper standard under Rule 23(b)(3) is a pragmatic one, which is in keeping with the basic objectives of the Rule 23(b)(3) class action. Thus, when common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis."
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> 7A C. Wright & A. Miller, Federal Practice and Procedure § § 1777, 1778 (1972). *See also id.* at § 1783; Wright & Colussi, The Successful Use of the Class Action Device in the Management of the *Skywalk* Mass Tort Litigation,-- Univ. of Missouri-Kansas City L.Rev.--(1984) (forthcoming) (noting [723] the successful use of a 23(b)(3) class in the *Skywalk* litigation); Note, Federal Mass Tort Class Action: A Step Toward Equity and Efficiency, 47 Albany L.Rev. 1180 (1983). Litigation economies are also relevant. One commentator has gone so far as to suggest that "the chief purpose of the predomination inquiry is not to measure the compatibility of class action procedures with substantive law but to determine whether a class action will in fact realize any litigation economies." Note, Developments in the Law--Class Actions, 89 Harv.L.Rev. 1318, 1505 (1976).

Unlike litigations such as those involving DES, Dalkon Shield and asbestos, the trial is likely to emphasize critical common defenses applicable to the plaintiffs' class as a whole. They will include such matters as that the substances manufactured could not have caused the injuries claimed; that if any injuries were caused by defendants' product it was because of the particular use and misuse made by the government; and that the government, not the manufacturers were wholly responsible because the former knew of all possible dangers and assumed full responsibility for any damage. No "defenses to liability [are] present affecting the individuals in different ways." *Advisory Committee Notes*, 39 F.R.D. at 103. It is anticipated that a very substantial portion of a prospective four-month trial will be devoted to just those defenses. Certification would be justified if only to prevent relitigating those defenses over and over again in individual cases.

Defendants' proposal to limit the class trial to the issue of the government contract defense is not a workable one. As this court has already noted, the issue of the government contract defense is inextricably interwoven with the issue of causation. *In re Agent Orange Product Liability Litigation*, 565 F.Supp. 1263, 1275-76 (E.D.N.Y. 1983). It would be impossible to try the former without litigating and reaching conclusions as to the latter.

Even more persuasive is the extraordinary size of plaintiffs' class and the posture of the dispute. Unlike a case such as *Mertens* or *"Dalkon Shield"*, a determination on the issue of causation would do much to resolve the individual claims of the class members. The plaintiffs have indicated that there

are a number of types of injuries which Agent Orange allegedly caused. The court has, therefore, ordered that, for purposes of the causation issue, plaintiffs' counsel will choose representative claimants for each type of injury alleged. A determination adverse to the plaintiffs in all categories could resolve the litigation and save considerable judicial and lawyers' time. Even if there is a finding of no causation as to less than all of the types of damage alleged, that determination alone would be likely to resolve tens of thousands of individual claims. *Cf. In re Antibiotic Antitrust Actions,* 333 F.Supp. 278, 281, *modified,* 333 F.Supp. 291; 333 F.Supp. 299 (S.D.N.Y. 1971).

Were there a finding of causation favorable to the plaintiffs across the board, that, too, will help resolve the individual claims of the class members. Unlike the asbestos, *DES, Dalkon Shield,* and *Federal Skywalk* cases, defendants contest liability not just as to individual members of the class, but as to any members of the class. Thus, unlike other mass product liability cases, a determination of general causation will serve both the interests of judicial economy and assist in the speedy and less expensive resolution of individual class member's claims. *Cf. Thompson v. Proctor & Gamble Co.,* No. C-80-3711 EFL (N.D.Cal. December 7, 1982), slip op. at 4; *Mertens v. Abbott Laboratories,* at 42-43. *See also* Note, Class Actions in a Products Liability Context--The Predomination Requirement and Cause-In-Fact, 7 Hofstra L.Rev. 859 (1979).

Finally, the court may not ignore the real world of dispute resolution. As already noted, a classwide finding of causation may serve to resolve the claims of individual members, in a way that determinations in individual cases would not, by enhancing the possibility of settlement among the parties and with the federal government.

The considerations already described make it clear why effective case management [724] would not be possible were the court to pursue the alternative of allowing individual

plaintiffs to intervene in a single case. A verdict in such a case either as to the affirmative defenses or causation might not be binding on the tens of thousands of plaintiffs not parties to the suit. A class action is, therefore, "superior to other available methods for the fair and efficient adjudication of the controversy."

Defendants further object that even if the litigation is otherwise suited for (b)(3) certification, the need to apply the law of dozens of different states would preclude certification or at least require different subclasses for each state. In most cases, this argument would have considerable force. As this court's opinions dealing with the choice-of-law problem in diversity cases and the law applicable to manufacturers' liability will show, it is of relatively little significance in this litigation. There is, as will be demonstrated, a consensus among the states with respect to the rules of conflicts and applicable substantive law that provides, in effect, a national substantive rule governing the main issues in this case. Since, in the main, one law applies to all the claims, certification of one class is appropriate. *Cf. In re No. Dist. Of Calif. "Dalkon Shield" IUD Product Liability Litigation,* 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins v. Abed,* --- U.S. ----, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983).

Should there subsequently develop a need for creation of subclasses as the litigation develops and applicable substantive or procedural law requires application of individual states' laws, further subclasses can be created. *See, e.g., Halderman v. Pennhurst State School & Hospital,* 612 F.2d 84, 110 (3d Cir. 1979), *rev'd on other grounds,* 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), *Kaufman v. Dreyfus Fund, Inc.,* 434 F.2d 727, 737 (3d Cir. 1970); *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 566 (2d Cir. 1968); *In re Caesars Palace Securities Litigation,* 360, 398 360 F.Supp. (S.D.N.Y. 1973).

The last objection the defendants have to (b)(3) certification is that a class-wide trial on causation violates their right

to have a single jury rule on the question of the defendants' liability to each Agent Orange plaintiff. Issues may not be bifurcated for trial, they point out, unless it appears that the issues are "so distinct and separable" that they may be tried separately "without prejudice." *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 501, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931); *Franchi Construction Co. v. Combined Ins. Co.*, 580 F.2d 1, 8 (1st Cir. 1978). If the issues are so interwoven that separate trials would cause confusion and uncertainty, a litigant is denied his right of fair trial. As applied to the *Agent Orange* litigation, defendants contend that advising a jury in a subsequent trial on "specific" causation that there has already been a "general" determination that Agent Orange could cause plaintiff's illness would unfairly prejudice the jury in plaintiff's favor. Defendants' argument is not persuasive. It is common in product liability suits for there to be a tacit admission that the defendant's product *could* have caused the injury alleged with the question for the jury being whether it actually did cause it. Juries often distinguish between general and specific causation.

In sum, the court finds (1) that the affirmative defenses and the question of general causation are common to the class, (2) that those questions predominate over any questions affecting individual members, and (3) given the enormous potential size of plaintiffs' case and the judicial economies that would result from a class trial, a class action is superior to all other methods for a "fair and efficient adjudication of the controversy."

Rule 23(b)(1)(A)

Certification is sought pursuant to Rule 23(b)(1)(A). The rule requires a risk of

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

The court has already stated that "Rule 23(b0(1)(A) is not meant to apply ... where [725] the risk of inconsistent results in individual actions is merely the possibility that the defendants will prevail in some cases and not in others, thereby paying damages to some claimants and not others." 506 F.Supp. at 789 (citations omitted). If the risk of paying money damages to some and not others were sufficient for (b)(1)(A) certification, almost every class action could be certified under (b)(1)(A). *See McDonnell Douglas Corporation v. United States District Court, Central District of California,* 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied sub nom. Flanagan v. McDonnell Douglas Corporation,* 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976); *see also* A. Miller, An Overview of Federal Class Actions: Past, Present and Future 43 (1973).

Plaintiffs attempt to distinguish the current litigation by expressing concern that if different courts decide differently future contractors will not know the possible extent of their responsibility and whether they should bid on government defense or war contracts. Their concern is commendable, but misplaced. Any inconsistent or erroneous theories of law applied by trial courts in Agent Orange cases will certainly be rectified in the highest courts. It is unlikely that the Supreme Court would avoid clarifying the law on the subject. Rule 23(b)(1)(A) is not applicable.

Rule 23(b)(1)(B)

Plaintiffs also seek certification of a mandatory class under Rule 23(b)(1)(B). Under that section, when the four prerequisites of 23(a) are met, the class will be certified if, in addition, as a practical matter, individual adjudications would prevent or greatly impede the ability of other members to protect their interests. It reads in part:

> adjudications with respect to individual members of the class ... would as a practical matter be dispositive of the interests of the other members not parties

> to the adjudications or substantially impair or impede their ability to protect their interests ...

The rationale for using (b)(1)(B) in mass tort litigation is that of the "limited fund." As Professor Miller put the matter:

> The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund ... and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers.

A. Miller, An Overview of Federal Class Actions: Past, Present and Future 45 (1977).

As applied to mass tort litigation, the "limited fund" is generally construed to be the assets of the defendants as extended by insurance coverage and the assets of the insurers. The "fund" may also have a more limited bearing, as where the first judgments may take all of a limited punitive damage award. If earlier claimants proceed on an individual basis, it is urged, they will deplete the defendants' assets and leave nothing for later claimants. *See, e.g.,* Note, Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions under Rule 23, 49 Brooklyn L. Rev. 517 (1983); Note, Class Actions for Punitive Damages, 81 Mich.L.Rev. 1787 (1983); Note, Class Certification in Mass Accident Cases Under Rule 23(b)(1), 96 Harv.L.Rev. 1143 (1981).

Before determining whether to certify the plaintiffs' class under (b)(1)(B), two threshold questions must be addressed. The first is whether (b)(1)(B) should ever be applied in mass tort litigation. The second, assuming that it should, is what standard to use in determining whether there is a risk that earlier litigants will deplete the fund and leave nothing for latecomers.

Although the matter is not free from doubt, most courts that have considered the issue have concluded that, in the proper circumstances, Rule (b)(1)(B) may be used in mass

tort cases. *See, e.g., Green v. Occidental Petroleum Corp.,* 541 F.2d 1335, 1340 n.9 (9th Cir. 1976); *Coburn v. 4-R Corp.,* 77 F.R.D. 43 (E.D.Ky. 1977), [726] *petition for mandamus denied sub nom. Union Light, Heat & Power Co. v. United States Dist. Court,*588 F.2d 543 (6th Cir. 1978), *cert. dismissed,* 443 U.S. 913, 99 S.Ct. 3103, 61 L.Ed.2d 877 (1979); *Hernandez v. Motor Vessel Skyward,* 61 F.R.D. 558 (S.D.Fla. 1973). *See also* Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L.Rev. 37 (1983); Note, Federal Mass Tort Class Action: A Step Toward Equity and Efficiency, 47 Albany L.Rev. 1180 (1983).

Two recent circuit courts reversed after certifications of a Rule (b)(1)(B) class in mass tort litigation. *See "Dalkon Shield,"* 693 F.2d 847 (9th Cir. 1982), *Federal Skywalk Cases,* 680 F.2d 1175 (8th Cir. 1982). Both courts recognized the applicability of (b)(1)(B) certification in mass tort cases. In *"Dalkon Shield,"* the court stated that "[we] are not necessarily ruling out the class action tool as a means for expediting multi-party product liability actions in appropriate cases." 693 F.2d at 851. The court's decision was based largely on the fact that no plaintiff or defendant supported class certification. In *In re Federal Skywalk* cases, the court's decision was expressly based on the narrow grounds that the district court's certification violated the Anti-Injunction Act. 680 F.2d at 1183. Neither of these considerations apply here.

Courts that have considered the issue disagree over how to determine when the danger of fund exhaustion is great enough to justify certification. All conclude that "without more, numerous plaintiffs and a large ad damnum clause should not guarantee (b)(1)(B) certification." Payton v. Abbott Labs, 83 F.R.D. 382, 389 (D.Mass. 1979). The Ninth Circuit has held that (b)(1)(B) certification is proper only when "separate punitive damage claims *necessarily* will affect later claims." "*Dalkon Shield,*" 693 F.2d at 852. (emphasis supplied). Strict adherence to the Ninth Circuit cer-

tainty standard would mean either the elimination of (b)(1)(B) certification in mass tort actions (which is the position at least one court has taken (*see Payton, 83 F.R.D. 382, 389),* or require a pretrial determination on the merits, which the Supreme Court has frowned on in another class action context. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2152-53, 40 L.Ed.2d 732 (1974)*; cf. Dolgow v. Anderson,* 438 F.2d 825(2d Cir. 1970) (no mini-trial on the merits). This strict Ninth Circuit standard flies in the face of the language of Rule 23, which requires only that there be a "risk" of impairment, not that there be a conclusive determination of impairment. *See* Note, Class Certification in Mass Accident Cases Under Rule 23(b)(1), 96 Harv.L.Rev. 1143, 1158 (1983).

In *Coburn*, 77 F.R.D. at 46, one of three unreversed mass tort cases where (b)(1)(B) certification was actually granted, the court did not articulate what standard it was using, stating merely that it found a "risk" of impairment. Given the speculative nature of many of the rulings that must be made at the time of a class certification when the facts have not been fully developed, such as typicality of representative claims and adequacy of representation, the probable risk standard appears most useful.

How high the probability needs to be requires an evaluation of the advantages and disadvantages of class certification to the actual and prospective parties. We must, for example, remember that the court is in the position of protecting a large group of war veterans against the possibility that after possibly winning a long-sought after victory in the courts, they will not be able to collect on a judgment in their favor. Without now rehearsing all those effects, it is enough to say that considering the particular facts of the instant litigation, the proper standard is whether there is substantial probability--that is less than a preponderance but more than a mere possibility--that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets. Considering the needs and problems of parties aligned both as plaintiffs

and defendants, the probability assessed at this time on the basis of limited information is somewhat less than 50 percent. The less-than-preponderance test is well recognized in procedural matters. *See, e.g.,*[727] *Rogers v. Missouri Pacific Railroad,* 352 U.S. 500, 509-10, 77 S.Ct. 443, 450, 1 L.Ed.2d 493 (burden of coming forward in F.E.L.A. cases); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 681 (2d Cir. 1971) ("reasonable probability" of employer's negligence in F.E.L.A. cases); *Bush v. United States*, 389 F.2d 485 (5th Cir. 1968) (in forfeiture case "less than prima facie legal proof ... more than mere suspicion ... reasonable under all the circumstances"); *United States v. One 1975 Lincoln Continental*, 72 F.R.D. 535, 540 (S.D.N.Y. 1976) ("probable cause" in forfeiture case); Note, F.E.L.A., Negligence and Jury-Trials-Speculation Upon a Scintilla, 11 Wes.Res.L.Rev. 123, 136 (1959) (interpretation supported by the "spirit of the statute"). *Cf. Calvert v. Katy Taxi, Inc.,* 413 F.2d 841 (2d Cir. 1969) (naked proof of collision enough to go to jury); Morgan & Maguire, Cases and Materials on Evidence, 1076-79, 1088-94, 1106-12 (7th ed. 1983); *United States v. Schipani*, 289 F.Supp. 43 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922, 90 S.Ct. 902, 25 L.Ed.2d 102 (1970); *United States v. Fatico*, 458 F.Supp. 388, *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980).

To determine whether that substantial probability exists in this case, the Special Master, Sol Schreiber, was directed to conduct a limited evidentiary hearing. *Cf. "Dalkon Shield,"* 693 F.2d at 852 ("the district court erred by ordering certification without ... even a preliminary fact-finding inquiry concerning [the defendant's] actual assets, insurance, settlement experience and continuing exposure."). At the hearing, defendants' counsel submitted certified copies of their most recent balance sheets. The plaintiffs' counsel selected a cross-section of their cases and made a brief presentation as to the nature of the damage alleged. The Master found that the combined net assets of the defendants, includ-

ing insurance, total approximately $9 to $16 billion. Collection of judgments, if any, would be spread over a number of years and payment could probably be handled from year-to-year and paid out of earnings. The Master also found that, based on the information presently available, his best estimate is that the number of claims may total 40,000 to 50,000. He concluded that the evidence now before the court does not support the view that provable claims will exhaust the defendants' assets.

The court has carefully reconsidered the Master's findings and all other information before the court. It is convinced that the risks as reasonably evaluated at this stage of the litigation allow (b)(1) certification on the issue of punitive damages only. The power of the court to certify the class under more than one section is not contested by the parties. *See* Manual for Complex Litigation § 1.43 (1982).

Plaintiffs contend that the limited fund can be found here in one of two ways. First, they contend that compensatory damages will exceed the net worth of the defendants. Second, they contend that even if the compensatory damages do not satisfy (b)(1), punitive damages will.

As to their first contention, the information elicited at the hearing and in appearances before this court indicates that sufficient assets are and will be available to respond to any probable judgments. Without the aid of a full trial, on the basis of facts presently available, it cannot be said that there is a substantial probability that if plaintiffs' claims are successful, the compensatory recovery will exceed defendants' assets.

Based on information thus far supplied to the court, it also cannot be found, as a preliminary matter, that there is a substantial probability that punitive damages, if allowed will, when added to compensatory damages, exceed defendants' assets. Apart from the equivocal nature of the evidence on the claimed callous disregard by the defendants of the effect of their product, also militating against a trial on award on

punitive damages is the fact that prejudicial evidence is likely to be introduced on the punitive damage issue. Finally, there may be a policy against substantial punitive damages in a case such as this. An award of huge punitive damages might discourage [728] government contractors from bidding for defense contracts and manufacturing material vitally needed for the national defense and might "seriously impair" the government's "ability to formulate policy and make judgments pursuant to its war powers." *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

Evidence that the government had almost as much, if not more, knowledge of the dangers posed by Agent Orange, and control by the government of its use are among the additional factors that would argue against punitive damages. It would be unfair to punish the defendants while the government, which might be equally, or even more, culpable, avoided all liability. Finally, merely instructing the jury as to punitive damages may distort the juror perceptions and make the case even more difficult to control. *See Koufakis v. Carvel,* 425 F.2d 892, 905 (2d Cir. 1970).

Nevertheless, there is a substantial probability that limited punitive damages may be allowed. If they are, it would be equitable to share this portion of the possible award among all plaintiffs who ultimately recover compensatory damages. Yet, if no class is certified under Rule (b)(1)(B), non-class members who opt out under Rule 23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all.

It is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing. In theory, therefore, when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must,

therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction. *See, e.g., Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-42 (2d Cir. 1967). Putz & Astiz, Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?, 16 U.San.Fran.L.Rev. 1, 18-40 (1981). At the very least, a trial court in passing on future claims may admit evidence as to the payment of prior awards which may be used by a jury to reduce an award to a party seeking additional punishment for the same misconduct. *See, e.g., State ex rel. Young v. Crookham,* 290 Or. 61, 618 P.2d 1268, 1272-73 (1980); Redden, Punitive Damages, § 4.8 (1980); Restatement (Second) of Torts, § 909 (1977); Morris, Punitive Damages in Tort Cases, 44 Harv.L.Rev. 1173, 1195 (1931). There is, therefore, a substantial probability that "adjudication with respect to individual members of the class ... would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." Accordingly, a class of all those described as members of the (b)(3) class are also certified under (b)(1)(B). The (b)(1)(B) certification is for the award of punitive damages.

How this decision under (b)(1)(B) affects plaintiffs' rights to opt out under Rule (b)(3) need not be decided now. In the first place, it is not clear that any appreciable number of plaintiffs will exercise their right to opt out under (b)(3). Nor is it clear that any punitive damages will be awarded. Thus, it seems sensible to allow exercise of opt-out powers, with the ultimate effect of that decision to be left for resolution on motion, full briefing and argument.

Assessment of possible damages is for the purpose of a class certification ruling only. It does not constitute a determination of what damages will be allowed after trial.

CLASS DEFINITION AND NOTICE

There remain the questions of defining the class and notice to the class. The defendants' contention that the class as

the court has defined it is unworkable because it is subjective ("all veterans who were injured ... by exposure to Agent Orange") is a *non sequitur*. Subjectiveness does not [729] affect the applicability of the class trial's findings to members of the class and it does not prejudice the defendants in any way. The class is, therefore, adequately defined and clearly ascertainable. *See Ihrke v. Northern States Power Company,* 459 F.2d 566 (8th Cir. 1972).

Federal Rule 23(c)(2) provides that, in a class action maintained under Rule 23(b)(3),

> the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

When members of the class can be identified through reasonable effort, individual notice is required; the expense of giving the notice must be paid by plaintiffs. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Abrams v. Interco, Inc.*, 719 F.2d 23 at 30 (2d Cir. 1983).

What is "the best notice practicable under the circumstances" and what constitutes "reasonable effort" is a determination of fact to be made in the individual litigation. *In re Franklin National Bank Securities Litigation*, 599 F.2d 1109 (2d Cir. 1978); *see also In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1098 n.11 (5th Cir. 1977) (and cases cited therein); C. Wright & A. Miller, Federal Practice & Procedure, at § 1786; Manual for Complex Litigation, § 1.45 (1982).

Accordingly, it is ORDERED:

1. Certification of this matter as a class action under Federal Rule of Civil Procedure 23(b)(3) is granted. Judge Pratt's decision certifying the class action status of this litigation under Rule 23(b)(3) is modified and confirmed. Plaintiffs' motion seeking certification under Rule 23(b)(1)(B) is granted only with respect to the claim for punitive damages.

2. The plaintiff class is defined as those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5- trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8- tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

The definition does not imply a conclusion that anyone within the class was injured as a result of exposure to any herbicide.

3. Notice to the members of the class shall be provided as follows:

(a) Plaintiffs' counsel, at their own expense, shall cause a copy of the written notice, attached as Exhibit A, to be mailed by first class United States mail to all persons who have filed actions as plaintiffs in the District Courts of the United States, or filed actions in state courts later removed to a federal court, which are pending in or have been transferred to this court for consolidated proceedings by the Panel on Multi-District Litigation, together with all persons who have moved to intervene or are intervenors, and each class member presently represented by counsel associated with plaintiffs' management committee who has not yet commenced an action or sought intervention. Mailing of the notice shall take place within 30 days of this Order.

(b) Plaintiffs' counsel, at their own expense, shall cause to be mailed a copy of the written notice to all persons who are currently listed on the United States Government's Veteran's Administration "Agent Orange Registry." This mailing shall take place within 50 days of this Order.

(c) Notice shall be mailed in envelopes that are printed only with the names of the addressee and the Clerk of this Court. Plaintiffs' counsel shall maintain a record of the name

and address of each person to whom the notice is mailed. The record shall be filed with the Clerk of the Court not later than 70 days after the issuance of this Order.

(d) Plaintiffs' counsel, at their own expense, shall obtain a post office box in Smithtown, New York, 11787, in the name [730] of the Clerk of the Court, and advise the court and the parties of the box number not later than 15 days after the issuance of this Order. The box shall be rented until further order of the court. Plaintiffs' counsel shall on a daily basis review the contents of the post office box and prepare a listing of all exclusion requests received, which shall be available to the court and the parties for inspection and copying, together with the exclusion requests. Plaintiffs' counsel shall send a copy of the notice and the exclusion request form to each person who writes to the Clerk of the Court requesting them. Each day plaintiffs' counsel shall transmit to the court and the parties copies of any communications (other than exclusion requests or requests for forms) that are received at the post office box. Plaintiffs' counsel shall maintain a record, together with the originals, of all mail returned as undelivered.

(e) Plaintiffs' counsel, at their own expense, shall serve a radio and television announcement notice in the form of Exhibit B on the nationwide networks of the American Broadcasting Company, the Columbia Broadcasting System, the Mutual Broadcasting System, the National Broadcasting Company, and the Public Broadcasting and Television Networks and on radio stations with a combined coverage of at least 50 percent of the listener audience in each of the top one hundred radio markets in the United States within 50 days of this Order.

Along with the radio and television notice served upon the nationwide radio and television broadcasting systems and radio stations, plaintiffs' counsel shall request that the notice be read as set forth in Exhibit B without interruption or comment, either alone or in conjunction with the showing on

television of the text of Exhibit B. Plaintiffs' counsel shall request that each participating radio and television broadcasting station advise them of the dates and times at which the notice was broadcast or shown.

Within 90 days of this Order, plaintiffs' counsel shall furnish to the court and the parties a report identifying the name and location of each radio station broadcasting the announcement, if known, and the date and time of each announcement. The court will then determine if further notice is required.

(f) Plaintiffs' counsel, at their own expense, shall publish in the following newspapers and magazines an announcement in two successive weeks (but if publication is monthly, only once) in the form of Exhibit C: the nationwide edition of *The New York Times, U.S.A. Today, Time Magazine,* the *America.. Legion Magazine, VFW Magazine, Air Force Times, Army Times, Navy Times,* and the *Leatherneck;* the ten largest circulation newspapers in Australia, including *The Australian;* and the five largest daily circulation newspapers in New Zealand, including *The Dominion.* Publication shall be completed as soon as practicable, but no later than March 1, 1984. The size of the notice shall be not less than one-eighth, nor more than one-third, of the newspaper or magazine page.

(g) Plaintiffs' counsel shall, at their own expense, obtain a toll-free "800" telephone number in the name of the Clerk of the Court. The number shall be in effect no later than January 1, 1984 to at least May 1, 1984. The number shall be manned on a daily basis, from at least Monday to Friday, 9:00 a.m. to 5:00 p.m., E.S.T., with knowledgeable persons (or a recorded announcement and recording device) who shall tell callers where to write for further information, but who shall not give advice concerning rights and responsibilities in this litigation. A record of those calling and giving their names and addresses shall be kept. Those requesting a copy of Exhibit A shall be sent one. No oral exclusion request shall be taken. Plaintiffs' counsel shall give written instructions to those answering the phone. A copy of such instructions and any recorded announcement shall be filed with the Clerk.

(h) The Clerk of the Court shall send this order and notice to the Governor of each of the states of the United States. He shall respectfully request each Governor to refer the notice to any state organization created by the executive or legislative branches [731] dealing with the problems of Vietnam veterans and request that the notice be sent to all those known Vietnam veterans who may be members of the class described in the Order, or that a list of names and addresses be supplied to this court so that notice may be mailed by the plaintiffs' counsel. The Clerk shall respectfully request a list of those to whom notice has been sent by any state agency.

(i) The notice provided for in this Order is the best reasonable and practicable notice under the circumstances of this litigation.

This Order is stayed for seven days to permit an application for a further stay to the Court of Appeals.

So Ordered.

Exhibit A

LEGAL NOTICE TO CLASS MEMBERS OF PENDENCY OF CLASS ACTION

This notice is given to you pursuant to an Order of the United States District Court for the Eastern District of New York and Rule 23(c)(2) of the Federal Rules of Civil Procedure. It is to inform you of the pendency of a class action in which you may be a member of the class, and of how to request exclusion from the class if you do not wish to be a class member. None of the claims described below have been proven. It is contemplated that a trial by court and jury will take place in this court beginning in May, 1984.

1. There are now pending in the United States District Court for the Eastern District of New York claims brought by

individuals who were in the United States, New Zealand, or Australian Armed Forces assigned to or near Vietnam at any time from 1961 to 1972, who allege personal injury from exposure to "Agent Orange" or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin (collectively referred to as "Agent Orange").

2. The plaintiffs include spouses, parents, and children born before January 1, 1984, of the servicepersons who claim direct or derivative injury as a result of exposure. Plaintiffs include children asserting claims in their own right for genetic injury and birth defects caused by their parents' exposure to "Agent Orange" and other phenoxy herbicides. Wives of veterans exposed to "Agent Orange" in Vietnam seek to recover in their own right for miscarriages. Plaintiffs' theories of liability include negligence, strict products liability, breach of warranty, intentional tort and nuisance. Damage claims of family members include pecuniary loss for wrongful death, loss of society, comfort, companionship, services, consortium, guidance and support. In addition, plaintiffs seek punitive damages for defendants' alleged misconduct in furnishing herbicides to the United States Government.

3. The defendants, who are alleged to have manufactured or sold "Agent Orange" to the United States Government, are Dow Chemical Company, Monsanto Company, T.H. Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc., Hercules Incorporated, and Thompson Chemical Corporation. All the defendants deny that the plaintiffs' alleged injuries were in any way caused by "Agent Orange." They assert that injury, if any, was not caused by a product produced by them. The defendants have challenged these suits on various other grounds including plaintiffs' lack of standing to sue, lack of jurisdiction, statutes of limitation, insufficiency in law, plaintiffs' contributory negligence, and plaintiffs' assumption of known

risks. Each has also asserted such affirmative defenses as the "government contract defense" and the Government's misuse of its product. In third-party complaints, the defendants asserted claims against the United States of America seeking indemnification or contribution in the event the defendants are held liable to the plaintiffs. The Government has asserted its power to prevent anyone from suing it.

4. This court has certified a class action in this proceeding under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The [732] plaintiff class consists of those persons who were in the United States, New Zealand, or Australian Armed Forces assigned to Vietnam at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to "Agent Orange" or other phenoxy herbicides including those composed in whole or in part of 2, 4, 5- trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8- tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children born before January 1, 1984, directly or derivatively injured as a result of the exposure.

The court may reconsider this decision, by decertifying, modifying the definition of the class, or creating subclasses in the light of future developments in the case. The definition does not imply a conclusion that anyone within the class was injured as a result of exposure to any herbicide.

5. The court has also certified a Rule 23(b)(1)(B) class limited to claims for punitive damages. The class includes the same persons as are in the Rule 23(b)(3) class. The court has decided not to permit members of the class to seek exclusion on the issue of punitive damages. You will therefore be bound by the court's rulings on punitive damages whether or not you seek exclusion on the issue of compensatory damages.

6. Trial of the representative plaintiffs' claims is scheduled to commence before Jack B. Weinstein, Chief Judge of the United States District Court for the Eastern District of New York, and a jury on May 7, 1984.

7. If you are a member of the plaintiff class you will be deemed a party to this action for all purposes unless you request exclusion from the Rule 23(b)(3) class action covering compensatory damages.

8. If you do not request exclusion from the class by May 1, 1984, you will be considered one of the plaintiffs of this class action for all purposes. You may enter an appearance through counsel of your own choice. You will be represented by counsel for the class representatives unless you choose to enter an appearance through your own legal counsel.

9. Class members who do not request exclusion will receive the benefit of, and will be bound by, any settlement or judgment favorable to the class covering compensatory damages. The class representatives' attorneys fees and costs will be paid out of any recovery of compensatory and other damages obtained by the class members. You will not be charged with costs or expenses whether or not you remain a member of the class. However, if you choose to enter an appearance through your own legal counsel, you will be liable for the legal fees of your personal counsel.

10. Class members who do not request exclusion will be bound by any judgment adverse to the class, and will not have the right to maintain a separate action even if they have already filed their own action.

11. If you wish to remain a member of the class for all purposes, you need do nothing at this stage of the proceedings.

12. *If you wish to be excluded from the class for compensatory damages, you must submit a written request for exclusion.* For your convenience, the request for exclusion may be submitted on the attached form, entitled "Request for Exclusion." If you received this notice by mail, a Request for Exclusion form should have accompanied it. If you did not receive a Request for Exclusion form, you may obtain a copy by writing to the Clerk of the Court, P.O. Box __,

Smithtown, New York 11787. A written Request for Exclusion may be submitted without using the Request for Exclusion form, but it must refer to the litigation as "In re 'Agent Orange' Product Liability Litigation, MDL No. 381"; include your name and address in your statement requesting exclusion. Any request for exclusion must be received on or before May 1, 1984 by the Clerk of the United States District Court for the Eastern District of New York at Post Office Box __, Smithtown, New York, 11787 or at a federal courthouse in the Eastern District of New York.

13. Under the court's Order, all potential plaintiffs are deemed to be members of [733] a Rule 23(b)(1)(B) class on the issue of punitive damages. At the time of trial the court will determine whether the facts presented warrant the submission of a punitive damage claim to the jury. In the event that there is a recovery for punitive damages, it will be shared by those plaintiffs who are successful in prosecuting their claims in this or other suits on an appropriate basis to be determined by the court. If you choose to exclude yourself from this class action on the issue of compensatory damages, you may do so without necessarily losing your right to share in any punitive damages.

14. The plaintiffs in this class action are represented by a group of attorneys who have been tentatively approved by the Court as the Agent Orange Plaintiffs' Management Committee. Members of this committee include:

Phillip E.Brown, Esq.
Hoberg, Finger, Brown, Cox & Molligan
703 Market Street (18th Floor)
San Francisco, California 94103

Stanley M. Chesley, Esq.
Waite, Schneider, Bayless and Chesley Co. L.P.A.
1513 Central Trust Tower

Fourth and Vine Streets
Cincinnati, Ohio 45202

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One Old Country Road
Carle Place, New York 11514

Thomas W. Henderson, Esq.
Baskin & Sears
Frick Building (10th Floor)
Pittsburgh, Pennsylvania 15219

Benton Musselwhite, Esq. & John O. O'Quinn, Esq.
609 Fannin (Suite 517)
Houston, Texas 77002

Stephen J. Schlegel, Esq.
Schlegel & Trafelet, Ltd.
One North LaSalle Street
Suite 3900
Chicago, Illinois 60602

Newton B. Schwartz, Esq.
Houston Bar Center Building
723 Main (Suite 325)
Houston, Texas 77002

David J. Dean, Esq. Has been designated by the court as plaintiffs' spokesman. The Management Committee is being

aided in its duties of representing the interests of the plaintiffs by other law firms in the United States and abroad.

15. *Examination of pleadings and papers.* This notice is not all inclusive. References to pleadings and other papers and proceedings are only summaries. For full details concerning the class action and the claims and defenses which have been asserted by the parties, you or your counsel may review the pleadings and other papers filed at the office of the Clerk of the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, on any business day from 9:00 a.m. to 5:00 p.m.

16. *Interpretation of this Notice.* Except as indicated in the orders and decisions of the United States District Court for the Eastern District of New York, no court has yet ruled on the merits of any of the claims or defenses asserted by the parties in this class action. This notice is not an expression of an opinion by the court as to the merits of any claims or defenses. This notice is being sent to you solely to inform you of the nature of the litigation, your rights and obligations as a class member, the steps required should you desire to be excluded from the class, the court's certification of the class, and the forthcoming trial.

---

[734] Robert C. Heinemann
Clerk, United States District
Court for the Eastern District
of New York
DATED: Brooklyn, New York
January 12, 1984

EXCLUSION REQUEST FORM

Clerk

United States District Court
for the Eastern District of New York
P.O. Box __
Smithtown, New York 11787

Re: In re "Agent Orange" Product Liability
Litigation MDL No. 381

I hereby request to be excluded from the class action in the above-captioned matter.

_____
(Signature)

Name (print): _____

Address: _____

If not a member of the armed forces who served in or near Vietnam, how are you related to such a serviceperson? _____

Armed forces unit of serviceperson_____

Armed forces identifying number of serviceperson

_____

I learned about this suit by

_____

Exhibit B (Radio and Television Communication)

SPECIAL ANNOUNCEMENT

Were you or anyone in your family on military duty in or near Vietnam at any time from 1961 to 1972? If so, listen carefully to this important message about a pending "Agent Orange" lawsuit that may affect your rights.

If you or anyone in your family claim injury, illness, disease, death, or birth defect as a result of exposure to "Agent Orange," or any other herbicide in or near Vietnam at any time from 1961 to 1972, you are now a member of a class in

an action brought on your behalf in the United States District Court for the Eastern District of New York, unless you take steps to exclude yourself. The class is limited to those who were injured by exposure to Agent Orange or any other herbicide while serving in the armed forces in or near Vietnam at any time from 1961 to 1972. The class also includes members of families who claim derivative injuries such as those to spouses and children.

The court expresses no opinion as to the merit or lack of merit of the lawsuit. It has ordered that this message be transmitted to give as many persons as is practicable notice of this suit.

For details about your rights in this "Agent Orange" class action lawsuit, call 1-800-_____, or write to the Clerk of the United States District Court, Box __, Smithtown, New York 11787. That address again is Clerk of the United States District Court, P.O. Box __, Smithtown, New York 11787, or call 1- 800-_____.

Exhibit C (Newspaper and Magazine Notice)

TO ALL PERSONS WHO SERVED IN OR NEAR VIETNAM AS MEMBERS OF THE ARMED FORCES OF THE UNITED STATES, AUSTRALIA AND NEW ZEALAND FROM 1961-1972

If you or anyone in your family can claim injury, illness, disease, death or birth defect as a result of exposure to "Agent Orange" or any other herbicide while assigned in or near Vietnam at any time from 1961 to 1972, you are a member of a class in an action brought on your behalf in the United States District Court for the Eastern District of New York unless you take steps to exclude yourself from the class. The class is limited to those who were injured by exposure to "Agent Orange" or any other herbicide while serving in the armed forces in or near Vietnam at any time during 1961-1972. The class also includes members of families who claim derivative injuries such as those to spouses and children.

The court expresses no opinion as to the merit or lack of merit of the lawsuit.

[735] For details about your rights in this "Agent Orange" class action lawsuit, call 1-800-_____, or write to Clerk of the Court, Box __, Smithtown, New York 11787.

_____

_____

Robert C. Heinemann
Clerk, United States District
Court for the Eastern District
of New York
DATED: Brooklyn, New York
December , 1983

Supreme Court, U.S.
FILED
SEP 23 2002
CLERK

(2)

No. 02-271

IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON, EMILY ELIZABETH STEPHENSON, JOE ISAACSON, and PHYLLIS LISA ISAACSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

34 pp

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QUESTION PRESENTED

Is there any doubt that putative class members who were not adequately represented in a class settlement, in violation of the Due Process clause of the Fifth Amendment, may continue to pursue their claims without *res judicata* serving as a bar?

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I. SUMMARY OF OPPOSITION

Respondents Daniel Stephenson and Joe Isaacson brought this case because in 1998 Stephenson was diagnosed with multiple myeloma and in 1996 Isaacson was diagnosed with non-Hodgkin's lymphoma, both potentially fatal forms of cancer associated with exposure to Agent Orange. Neither was injured at the time of the *In Re: Agent Orange* class action settlement, nor were they even aware that the litigation was pending. Nevertheless, Petitioners successfully urged the trial court to dismiss Respondents' claims, because pursuant to the terms of the settlement Respondents had not been "fortunate" enough to have been diagnosed with cancer before December 31, 1994, the date all possibility of compensation was cut off. Nor did it matter that these claims were asserted to have been settled in Respondents' absence before Respondents' claims had ever accrued.[1] On appeal, the Second Circuit reversed, holding that this case presents a clear violation of due process, consistent with the fears voiced by this Court in its opinions in *Amchem Products v. Windsor*, 521, U.S. 591 (1997) and *Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999). The Second Circuit concluded that there was a conflict of interest between present claimants and post-1994 future "no compensation" claimants, which required that the latter group have separate representation to protect their interests. If they had had independent legal counsel,

1. Joe Isaacson, a citizen of New Jersey, initially brought his case in New Jersey state court. New Jersey courts have consistently rejected bringing a claim for the potential of future harm absent a manifestation of the harm or evidence that it is reasonably probable that it will occur. *Mauro v. Raymark Industries*, 116 N.J. 126, 561 A.2d 257 (1989). If Joe Isaacson had sought to bring an action before 1984 in New Jersey, he could not have stated a claim for which relief could be granted.

that counsel would certainly not have agreed to a complete denial of compensation for these claimants, including Respondents, in order for present claimants to receive compensation.

The Second Circuit's decision, allowing Respondents to proceed with their cases, constitutes nothing more than a straightforward application of due process, consistent with this court's holdings in *Amchem* and *Ortiz*, as applied to these very egregious facts. Indeed, the facts presented by Respondents are so extraordinary that, as stated by the Second Circuit, it is clear that none of the previous *Agent Orange* decisions, which had generally affirmed the settlement, had ever ruled on the adequacy of representation for victims, such as Respondents, whose claims accrued after the 1994 termination of all compensation. In any event, as the facts at issue are not only egregious but *sui generis*, this Court should not grant *certiorari* in order to soothe the vague fears voiced by Petitioners.

In finding that *res judicata* did not constitute a bar to Respondents' claims due to the fact that they were inadequately represented, the Second Circuit duly followed more than sixty years of precedent dating back to *Hansberry v. Lee*, 311 U.S. 32 (1940). Indeed, despite Petitioners' claims to the contrary, there are no circuits which opine that *res judicata* should be summarily applied to any collateral attack on a class action settlement regardless of its infirmities so long as the settling court considered due process issues in approving the settlement. While Petitioners argue that a decision of the Ninth Circuit places such limits on a collateral review of a prior class settlement, the court below expressly found that there was no conflict between its holding and that of the Ninth Circuit, opining that even under the standard applied in the Ninth Circuit the result here would have been the same.

II. STATEMENT OF THE CASE

A. FACTUAL PRELUDE TO THE SECOND CIRCUIT'S DECISION

Daniel Stephenson served in Vietnam from 1965 to 1970, both on the ground and as a helicopter pilot. He was in regular contact with Agent Orange during that time. On February 19, 1998, he was first diagnosed with multiple myeloma, a bone marrow cancer associated with exposure to Agent Orange, and he has undergone a bone marrow transplant. Before the time of the settlement in 1984 he had suffered no "injuries" related to his Agent Orange exposure. [9a] He was only diagnosed with multiple myeloma after all right to compensation from the *Agent Orange* settlement was terminated.

Joe Isaacson enlisted in the Air Force and served in Vietnam, where he worked at one of the airfields from which planes took off to spray Defendants' various mixtures of chemical herbicides, including "Agent Orange" [Ra2] In 1996, Joe Isaacson was diagnosed with non-Hodgkins lymphoma.[2] However,at the time of the Agent Orange

2. Contrary to the suggestion of Petitioners at p. 3 of their petition, presently there is substantial basis to conclude that Respondent Isaacson's exposure to herbicides in Vietnam caused his non-Hodgkin's lymphoma. (*See*, for instance, the results of a blue-ribbon panel of the National Academy of Sciences' Institute of Medicine, which was subjected to extensive peer review, and found that: "Evidence is sufficient to conclude that there is a positive association between exposure to herbicides (2,4-D, 2,4,5-T . . .) and non-Hodgkin's lymphoma." *Veterans and Agent Orange, Health Effects of Herbicides Used in Vietnam*, National Academy Press (1994), In any case, Petitioners' hopeful statements regarding any alleged difficulties Respondents may have fulfilling the requirements

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settlement in 1984, Isaacson suffered no injuries related to Agent Orange exposure. As with Stephenson, his diagnosis of cancer came after all rights to recovery from the *Agent Orange* settlement fund were terminated.

In 1978, when other Vietnam veterans first brought actions for damages they believed were due to their Agent Orange exposure, neither Joe Isaacson nor Daniel Stephenson knew that claims of these other Vietnam veterans were being brought nor that they were consolidated before the U.S. District Court for the Eastern District of New York as part of MDL 381 (Ra2). Neither Stephenson nor Isaacson filed a lawsuit related to Agent Orange, consulted with an attorney, or contacted the Veterans Administration regarding their exposure to Agent Orange in Vietnam. (Ra2) Even if they had done any of these things, being uninjured at the time, they would not have had any reason to believe that they were included as members of an *Agent Orange* class, which was defined by public notice in 1983 to include only:

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of medical causation and combating their government contractor defense are irrelevant to any question that is before this Court. As stated by the Second Circuit:

> This argument misses the mark. At this stage, we are only addressing whether plaintiffs' claims should be barred by *res judicata*. We are therefore concerned only with whether they were afforded due process in the earlier litigation. Part of the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts. The ultimate merits of the claims have no bearing on whether the class previously certified adequately represented these plaintiffs. (20a)

> [T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 **who were injured** while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . .

[3a] (emphasis added)

Nor did either Daniel Stephenson or Joe Isaacson know that the deadline for opting out of this Rule 23(b)(3) class was May 1, 1984. Indeed, contrary to the averments of Petitioners (Petitioners' Brief at 24 n.6), neither they nor any other class member ever had an opportunity to opt out of the MDL 381 settlement. This is because the termination of the right to opt out of the class action occurred on May 1, 1984, while the settlement itself was entered into on May 7, 1984 — six days after the opt out right was terminated. [4a]

Furthermore, without providing a second notice permitting opt outs from the settlement, the class, as settled, was defined so that it "specifically includes persons who have not yet manifested injury."[4a] While provision was made for recovery by some potential future plaintiffs, the settlement made it clear that: "No payment will be made for death or disability occurring after December 31, 1994." [5a] The settlement thus created two separate sub-classes of future claimants; a subclass eligible for compensation if their injuries occurred before December 31, 1994, and a second "no compensation" sub-class, composed of all veterans who first manifested injury after 1994 regardless of

any other similarities between the members of these purely chronologically based subclasses.[3]

Because neither Joe Isaacson nor Daniel Stephenson was aware of the class action, and neither suffered any "injury" at the time of the settlement, neither could have been aware that they were included in the settlement when the word "injury" was defined to include injuries that no ordinary person would be aware of, i.e. those injuries which had "not yet manifested." It was only after all settlement funds were depleted that Respondents were first diagnosed with the cancers that ordinary citizens would understand to be "injuries." Only then did they have reason to investigate the cause of their cancers, find out that their cancers were associated with their exposure to herbicides in Vietnam, and bring these claims; only then to hear Petitioners assert that their cases had long been settled, even though the settlement entitled them to no compensation.

Although Petitioners maintain that the original *Agent Orange* courts determined the adequacy of representation for

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3. The Second Circuit noted that Isaacson and Stephenson likely did not receive the adequate notice which would be necessary to bind absent class members pursuant to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), 472 U.S. at 812. Citing *Amchem*, the court indicated that effective notice could likely not ever be given to exposure-only class members in a situation such as this. *Amchem*, 521 U.S. at 628. However, because they had already concluded that Respondents were inadequately represented, and thus were not proper parties to the prior litigation in the first place, they determined that they did "not [need to] definitively decide whether notice was adequate." [19a at n.8] As this Court has stated, "[e]ven if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out". *Amchem*, *Supra.* at 626.

this subclass of veterans, the long history of the *Agent Orange* litigation shows that the adequacy of representation for this "no compensation" post-1994 sub-class was never considered. In its original decision on class certification, *In Re: Agent Orange Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980) the District Court's entire discussion of adequacy of representation consisted of a single paragraph, stating that:

> [T]he court will select from among the hundreds of plaintiffs representative persons who have a substantial stake in the litigation, who lack conflicts, antagonisms, or reasons to be motivated by factors inconsistent with the motives of absentee class members, and who will fairly and adequately protect the interests of the class.

506 F. Supp. at 788.

In its subsequent opinion on class certification, *In Re: Agent Orange Product Liability Litigation*, 100 FRD 718 (E.D.N.Y. 1983), the district court offered no additional analysis of the adequacy of representation for future claimants. *Id.* at 721.

The class certification decisions were subsequently reviewed by the Second Circuit at 818 F.2d 145 (2d Cir. 1987). While the Second Circuit recognized that there was some diversity of interests among the class, including those with "strong claims" and those with "weak claims," *Id.* at 165-166, the Second Circuit concluded that the "use of the class action was appropriate, although many potential difficulties were avoided only because all plaintiffs had very weak cases on causation." *Id.* The circumstances of post-1994 claimants were not addressed.

In the *Ivy/Hartman Agent Orange* cases, the District Court, rather than rely on its previous opinions, independently reviewed the adequacy of representation issues. *Ryan v. Dow Chemical Company*, 781 F. Supp. 902, 919-20 (E.D.N.Y. 1991). However, that collateral review never dealt with post-1994 "future claimants," instead concentrating on the fact that pre-1994 "future claimants" fared no differently than "present claimants." The district court concluded that the *Ivy/Hartman* plaintiffs were adequately represented, because: "[t]hese plaintiffs like all class members who suffered death or disability *before the end of 1994* are eligible for compensation from the Agent Orange Payment Fund." 781 F. Supp. at 919. (emphasis supplied). In finding that representation was therefore adequate, the Second Circuit quoted the District Court's language, *In Re: Agent Orange Product Liability Litigation (Ivy/Hartman Appeal)*, 996 F.2d 1425, 1435-36 (2d Cir. 1993), and concluded that because the *Ivy/Hartman* future and past claimants were being treated identically, no separate subclass of future claimants needed to be appointed under the facts presented at that time.

B. THE DECISION BY THE SECOND CIRCUIT IN THIS CASE

1. The Second Circuit Determined That Notice to Respondents Was Inadequate and That Specific Issues of Adequacy for Post-1994 "No Compensation" Claimants Were Never Previously Decided

The Second Circuit's decision in this case found that neither the *Ivy/Hartman* holding nor any other *Agent Orange* holding had ever:

> [A]ddressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlements funds. *See Ivy/Hartman II*, 996 F.2d at 1436 (creating a subclass of future claimants was unnecessary because the settlement covered such claimants); *Ivy/Hartman I*, 781 F. Supp. at 919 ("These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund.") [13a-14a][4]

Therefore, the Second Circuit held that Respondents' "suits can go forward because there has been no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund."[5] [14a]

Because the prior settlement "purported to settle all future claims but only provided for recovery for those whose

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4. At n.7 at 19a, the Second Circuit reiterated the difference between the two rulings:

> Again we distinguish the *Ivy/Hartman* cases, which held that pre-1994 claimants were adequately represented in the prior *Agent Orange* litigation. This conclusion was based, at least in part, on those claimants' eligibility for compensation from the settlement fund. *See Ivy/Hartman I*, 781 F. Supp. at 919; *Ivy/Hartman II*, 996 F.2d at 1435-36.)

5. Petitioners' suggestion that the *Stephenson* decision incorrectly interprets the *Ivy/Hartman* decision is inconsistent with the fact that Judge Cardamone sat on the unanimous panels of both the *Ivy/Hartman* decision and the *Stephenson* decision.

death or disability was discovered prior to 1994," the Second Circuit held that the conflict between Respondents "and the class representatives becomes apparent. No provision was made for post-1994 claimants, and the settlement fund was permitted to terminate in 1994." The Second Circuit concluded that given the due process requirements of *Amchem* and *Ortiz*, "Stephenson and Isaacson were not adequately represented in the prior *Agent Orange* litigation. Those cases indicate that a class which purports to represent both present and future claimants may encounter internal conflicts." [19a]. Because there was no separate representation for the post-1994 subclass, and neither Respondent had been adequately represented, the Second Circuit concluded that they were not bound by the class settlement.

2. The Second Circuit Found That It Is Routine for a Second Court to Determine the *Res Judicata* Effect of a Class Action by Analyzing Whether Due Process Was Met and That Doing So Did Not Create a Conflict among the Circuits

The Second Circuit succinctly stated:

> [T]he propriety of a collateral attack such as this is amply supported by precedent. In *Hansberry v. Lee*, 311 U.S. 32 (1940), the Supreme Court entertained a collateral attack on an Illinois state court class action judgment that purported to bind the plaintiffs. The Court held that class action judgments can only bind absent class members where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation." *Id.* at 41; cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) ("[I]t is true that a court adjudicating a dispute may not be able to predetermine the *res judicata* effect of its own judgment."). Additionally, we have previously stated that a "[j]udgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented." *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978); aff'd 444 U.S. 472 (1980).

[14a-15a] In further support of this position, the Second Circuit cited *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973); *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266 (7th Cir. 1998); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998); and *Crawford v. Honig*, 37 F.3d 485, 488 (9th Cir. 1994) [15a-16a]

Moreover, the Second Circuit expressly distinguished the one case which Petitioners explicitly claim creates a "conflict among the circuits," the Ninth Circuit decision in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999). The Second Circuit held that neither the District Court nor the Second Circuit had previously determined the adequacy of representation with respect to the post-1994 "no compensation" subclass, and that even *Epstein* requires a review to determine whether the rendering court followed proper procedures. Therefore, "without adopting the Ninth Circuit's decision in *Epstein*, [the Second Circuit] conclude[d] that plaintiffs' collateral attack is proper even under its standard." [n.6 at 14a][6]

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6. While Petitioner's Brief at 7 and 9 seems to criticize the Second Circuit for conducting what they call a *de novo* review of whether there was adequate representation afforded Respondents, the *de novo* review mentioned by the Second Circuit was actually

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III. REASONS FOR DENYING THE PETITION

A. BECAUSE THE SECOND CIRCUIT'S HOLDING IS CONSISTENT WITH *AMCHEM* AND *ORTIZ*, THERE ARE NO CONFLICTS BETWEEN THE CIRCUITS ON DUE PROCESS ISSUES RELATED TO MASS TORT PERSONAL INJURY SETTLEMENTS AND THERE IS NO LIKELIHOOD OF THE DIRE PREDICTIONS OF PETITIONERS COMING TO PASS

Twice in the past five years, this Court has addressed the precise question of whether a class action can settle the tort claims of both present and future claimants when the subclass of future claimants is not separately represented. Both times this Court answered that question with a resounding "no". Petitioners present no reason to consider this question again.

In *Amchem*, *supra*, a class action settlement of present and future asbestos related injury claims, the same class representatives and class counsel represented all claimants, present and future. This court found an inherent conflict between the claims of the currently injured, whose "critical goal is generous immediate payments" and the interest of future claimants in ensuring an "ample" fund for the future. *Supra* at 626. The inherent tensions between these positions

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the one required pursuant to a dismissal under Rule 12(b)(6): "We review a dismissal under Rule 12(b)(6) *de novo*, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiffs' favor." *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 161 (2d Cir. 2000). [10a].

prevented class representatives from fairly and adequately protecting the interests of the class as required by Rule 23(a)(4).

In *Ortiz*, *supra*, this Court extended the *Amchem* holding to the settlement of a limited fund class under Rule 23(b)(1)(B). Even where the class was held together by its interest in recovering the limited fund, this Court held that future claimants needed separate representation to eliminate the conflicting interests of counsel and the class. Because no such procedure was employed in *Ortiz*, this Court held that the future claimant subclass was not adequately represented.

Petitioners do not contend that either *Amchem* or *Ortiz* was wrongly decided. There is no question that if the same *Agent Orange* settlement were before the Court today, it would violate this Court's proscriptions in *Amchem* and *Ortiz*; both Respondents were future claimants without any manifested injuries in 1984 and there was no provision for the representation of the subclass of these future claimants at the time of the settlement.

Instead, Petitioners' chief contention seems to be that the Second Circuit should have ignored *Amchem* and *Ortiz* in favor of *Ivy/Hartman*. This is because, they argue, applying *Amchem* and *Ortiz* to prior settlements will lead to "long enduring and pernicious" results, including subverting the goal of settlement finality for numerous other settlements, encouraging non-named class members to withhold their objections, and reopening "countless final judgments." (Petitioners' Brief at 11, 16 and 22) While predicting this potential doom for a multitude of unspecified settlements, Petitioners do not point to a single instance where the decision

of the Second Circuit, now almost a year old, has been relied upon and actually resulted in the undoing of any such past settlements. Certainly this Court does not need to undertake a review of *this* case in order to prevent undoing any present or future settlements; any attempt to settle a mass tort case must follow *Amchem* and *Ortiz*, and the decision of the Second Circuit did nothing to expand upon any of the principles articulated therein. Thus, Petitioners unspecified fears are nothing more than hyperbole.

Moreover, Petitioners fail to make clear that the *Ivy/Hartman* decision itself resulted from the reviewing Court's consideration of a collateral attack. Indeed, even if there were some artificial limit on the number of times *different* victims could present collateral attacks on due process grounds, Petitioners' claim that the *Ivy/Hartman* result has a *res judicata* effect upon Respondents confuses the doctrine of *res judicata* with that of *stare decisis*. Although Petitioners insist that the *Ivy/Hartman* appeal is "*res judicata*," no certified class appealed in *Ivy/Hartman* and Respondents were neither parties nor participants in the *Ivy/Hartman* collateral attack. Therefore, even if *Ivy/Hartman* had concluded that there was adequate representation for post-1994 claimants, *which it did not*, under no circumstances would its holding bar the actions brought by these particular Respondents.

B. DEPRIVATION OF DUE PROCESS THROUGH INADEQUATE REPRESENTATION CAN, AND USUALLY MUST, BE HEARD ON COLLATERAL ATTACK

For more than a half century, a collateral attack raising issues of due process has been an essential part of the guarantee of due process. However, Petitioners wish this

Court to entertain the argument that adequacy of representation should never be evaluated through a collateral attack, no matter how inadequate and violative of due process the initial proceedings, so long as the adequacy issue was reviewed by the rendering court: "This Court should decide, therefore, whether once a case is settled and there has been a final ruling that the class has been adequately represented, *res judicata* bars any collateral challenge to that judgment . . ." (Petitioners' Brief at 19)

This question challenges the law as it has been applied by the Second Circuit and every other circuit. Collateral attacks on the validity of prior judgments, whether on grounds of inadequacy of representation or any other due process reason, have been routinely reviewed by sister courts at least since this Court decided *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). Indeed, this principle has even been incorporated into Federal Rule 23:

> Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment. *This can be tested only in a subsequent action.*

Advisory Committee Note to F.R.C.P. 23. (emphasis supplied).

An absent class plaintiff who wishes to challenge a settlement based upon inadequate representation or notice has three possible courses of action: 1) to intervene before a judgment is entered; 2) to appeal a judgment entered in the trial court; or 3) to mount a collateral attack on the settlement. While the first option is generally available if a plaintiff is aware of the pendency of the class settlement before judgment is entered, it is also clear that neither the common law of *res judicata* nor

Rule 23 requires a party who is not adequately represented to intervene to avoid the preclusive effect of a lawsuit. *Martin v. Wilks*, 490 U.S. 755 (1989). *See also Shults v. Champion International LLP*, 35 F.3d 1056, 1059 (6th Cir. 1994); *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987); *Gotlieb v. Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988). This is allowed in part because a collateral review serves as a check on attempts by overreaching settlements to bind absent claimants.

On the other hand, the preclusion of such an attack would give rise to the true horror: people with cancer and other catastrophic long latency diseases would forfeit their claims through releases without compensation, solely because their diseases did not manifest earlier. All absent future plaintiffs would be completely dependent upon persons with different interests to protect their rights. If those persons failed to make the appropriate arguments about due process, their class actions would be routinely approved, even without compliance with any of the mandates of due process, much less those articulated by *Amchem* and *Ortiz*.

In short, without the right to collateral attack, *Amchem* and *Ortiz*, as well as all other due process protections to an absent class member, lose their force. That is why this Court has recognized at least since *Hansberry v. Lee*, *supra*, that due process protections require the reviewing court to determine the extent that *res judicata* may be applied.

C. THERE IS NO SPLIT IN THE CIRCUITS

In an effort to convince this Court to take this case, Petitioners raise the specter of a conflict in the circuits, arguing that the Second Circuit's opinion in *Stephenson* somehow conflicts with the decision of other circuits, and especially the Ninth in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. cert denied) 528 U.S. 1004 (1999). *See also Grimes v. Vital Link Communications Corp.*, 17 F3d 1553 (3d Cir. 1994); and *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1999).

This specter is false on four counts. First, *Epstein*, *Grimes* and *Nottingham* never considered the question of whether a potential future claimant, whose interests were not adequately represented by present claimants, could bring a collateral attack. Second, *Epstein* and its forerunners explicitly permitted at least limited collateral attack to review whether the procedures were adequate to afford absent class members due process. Third, *Epstein* and its forerunners dealt with fully cognizable economic claims, rather than unaccrued personal injury claims. Fourth, each of those three decisions was based upon nuances of Delaware law.

Epstein, *Grimes* and *Nottingham* all involved federal court review of the *res judicata* effect of Delaware state court judgments on shareholders in securities class actions under the Full Faith and Credit Act, 28 U.S.C. § 1738. In each case, the objecting parties had filed their own federal court action concurrently with the Delaware state court action. In *Nottingham* they actually litigated those objections in state court before trying to re-litigate them in federal court. *Nottingham*, *supra* at 32. In *Grimes* and *Epstein*, the objections raised by the Respondents were either litigated in earlier state court proceedings by either Respondents or others with precisely the same interest. *Grimes supra*, at 1558; *Epstein*, *supra*, 179 F.3d at 647.

These cases therefore addressed entirely different legal issues — the *res judicata* effect of Delaware state court judgments under the Full Faith and Credit Act — in a different factual setting — where the persons collaterally attacking the judgment had present, fully cognizable economic losses, fair notice of the proceedings, and an opportunity to be heard.

Yet, even in that setting, the *Epstein* court recognized that a limited collateral review was required "to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue". *Id.* at 648-649. Significantly, in *Stephenson*, the Second Circuit held that neither Respondent had the opportunity to determine the adequacy of the representation regarding their claims "until after the settlement expired". Thus, the Second Circuit, "without adopting the 9th Circuit's decision in *Epstein*" concluded that "plaintiff's collateral attack is proper even under its standard". [14a at n.6]. Hence, there is no conflict between the circuit to be resolved.

D. THE SECOND CIRCUIT DID NOT APPLY ANY NEW STANDARDS IN REACHING ITS DECISION: IT APPLIED EXISTING STANDARDS TO THE NOVEL FACTS RAISED BY THIS CASE AND, THEREFORE, NO QUESTION REGARDING THE APPLICATION OF REVISED STANDARDS IS PRESENTED

Petitioner's argument that the Second Circuit erred by examining the adequacy of representation "from today's perspective" as opposed to "from the perspective of the time when the class was certified" similarly misses the point. It is not the *standards* which the court used in 1984 or 1993,

or any "change" in those standards arising from the *Amchem* and *Ortiz* decisions, that gave rise to the Second Circuit's decision. It is that the specific issue of adequate representation for post-1994 claimants presented by Isaacson and Stephenson was never before the court originally or in the *Ivy/Hartman* appeal; no court ever stated that a settlement which purported to resolve all future claims, but only provided for a recovery for those future claims which were discovered before 1994, did not create a conflict between different types of claimants and did not require separate representation for the post-1994 "no compensation" claimants.

Furthermore, this Court's decisions in *Amchem* and *Ortiz* did not change or overrule previously settled law — they simply explained the application of due process in existing law as it related to Rule 23. *Hansberry v. Lee and* Rule 23 had always made it clear that class representatives must adequately represent the class or a class action judgment would be subject to collateral attack on due process grounds. Even before *this Court's* decision in *Amchem*, the Third Circuit, interpreting existing law, found that the class of future claimants was not adequately represented because intra-class conflicts between present and future claimants required separate representation for each. *Georgine v. Amchem Products*, 83 F.3d 610, 630-732. (3d Cir. 1996) This Court's affirmation of that decision was consistent with the fundamental requirements of due process and overruled nothing. Simply put, "adequate representation" would never be consistent with the total sacrifice of a class of immature future claims in favor of actual recovery for similarly situated present claimants.

IV. CONCLUSION

The Second Circuit's decision simply and rightfully applied the principles of due process, emanating from *Hansberry*, to the *sui generis* facts presented by this litigation. The decision is neither unusual nor surprising — nor is there any split in the circuits on the fundamental aspects of this decision. As such, the writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — AFFIDAVIT OF JOE ISAACSON DATED NOVEMBER 21, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL No. 381

In re

"Agent Orange"

Product Liability Litigation

Civ. No. 98-6383 (JBW)

JOE ISAACSON AND PHYLLIS LISA ISAACSON, h/w

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, et al.,

Defendants.

Civ. No. 99-3056 (JBW)

DANIEL RAYMOND STEPHENSON,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, et al.,

Defendants.

Appendix

AFFIDAVIT OF JOE ISAACSON IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I, Joe Isaacson, being duly sworn, depose and say as follows:

1. I served in Vietnam and am informed and believe that I was exposed to phenoxy herbicides, including "Agent Orange," during my tour of duty in Vietnam from September 1968 to September 1969. Among the places that I served during this period was Phan Rang Air Force base.

2. After I returned from Vietnam, I paid little attention to whether or not I had been exposed to herbicides, including Agent Orange, while serving in Vietnam.

3. Before 1996, I was unaware that the cases of veterans who claimed to have been injured by these herbicides were consolidated into a single action in Brooklyn known as In re "Agent Orange" Product Liability Litigation nor was I aware of the existence of a class action lawsuit on behalf of veterans who were exposed to herbicides.

4. Before 1996, I never filed a lawsuit related to my exposure to herbicides in Vietnam, I did not consult with any attorneys regarding my exposure to herbicides in Vietnam, I never contacted the Veterans Administration or the Department of Veterans' Affairs regarding my herbicide exposure. I belonged to no veterans' organizations, and I was not aware (and am still not aware) of being listed on any "Agent Orange" registry.

Appendix

5. I do not recall ever seeing, reading or hearing any notice of a class action for herbicide-exposed Vietnam veterans, whether by direct mail or by publication, either in print, on radio, or on television.

6. I do not recall ever receiving any notice of a class which included: "[T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides. . . ." If I had received this notice in 1983 or 1984, I would not have believed it to have included me. This is because it was not until 1996, when I was diagnosed with non-Hodgkin's lymphoma, that I believed that I had in any way been injured by exposure to 'Agent Orange or other phenoxy herbicides' while I was in Vietnam.

7. I do not recall ever receiving any notice of a settlement of a class action on behalf of Vietnam veterans exposed to 'Agent Orange and other phenoxy herbicides' at any time. Before 1996 I was never advised in any fashion as to what effect such a settlement might have on my rights to bring a claim in the future. Having not heard of such a settlement, before 1996 I certainly do not recall ever being advised of any rights to object to the terms of such a settlement or being told any particulars of the settlement, nor do I recall being advised of a right to opt out of either a class action or a class action settlement.

8. In 1996 I was employed as an assistant principal in a Middle School setting. In the late summer of 1996 I was diagnosed with non-Hodgkin's lymphoma. I am informed and

believe that the Department of Veterans' Affairs has determined that my non-Hodgkin's lymphoma is connected to my service in Vietnam. Before being diagnosed with non-Hodgkin's lymphoma, I did not believe that I had suffered any injuries related to my exposure to Agent Orange and other phonoxy herbicides in Vietnam. I do believe that my non-Hodgkin's lymphoma is related to my exposure to phonexy herbicides in Vietnam.

9. It was only after being diagnosed with non-Hodgkin's lymphoma that I became aware of the existence of a class action and a class action settlement on behalf of Vietnam veterans which took place around 1984. I further became aware that at the time of my diagnosis neither I nor my heirs would be able to receive any funds from that particular settlement, because all settlement funds had been paid out without preparing for the fact that I and other veterans might get cancer from Agent Orange after 1994. I, therefore, have not received any payments from what I understand to have been called the Agent Orange Veterans' Payment Program.

10. I also am not aware of having received any benefits related to my Vietnam 'Agent Orange phenoxy herbicide' exposure from any organization funded by what has been called the Agent Orange Class Assistance Program.

11. I therefore am not aware of having received any compensation in any form from any corporation that manufactured the phenoxy herbicides that I was exposed to which caused my cancer.

I verify under penalties of perjury that the foregoing is true and correct.

s/ Joe Isaacson
Joe Isaacson

B. Respondents' Argument That They Lacked Actual Notice Of The Settlement Has No Relevance To The Current Posture Of The Case Or Its Suitability As A Vehicle For This Court's Review.

Respondents also suggest that the court below was correct to allow them to mount a collateral attack on the prior settlement and judgment because they did not receive actual notice of the class action. Opp. 5-6, 15-16, 1a-5a. The court of appeals, however, expressly declined to reach the issue of notice. The rule of law it announced, therefore, does not depend on any assumption of inadequate notice.[1]

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[1] In any event, due process cannot be, and has never been, understood to require individual notice in all circumstances. To the contrary, this Court has long held that due process requires notice that is "reasonably calculated, under all the circumstance, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted). In the context of a class action under Rule 23(b)(3), the requirements of due process are satisfied by "the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2); *see also In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1110 (10th Cir. 2001). In view of the elaborate notice provisions required by the district court and the total impracticality of attempting to ensure individual notice to all Vietnam veterans, there is no occasion to second-guess the prior determination of the court of appeals that the notice provided was, in fact, "'the best notice practicable' under Federal Rule of Civil Procedure 23(c)(2)." (Pet. App. 6a; *see also In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 167-69 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).)

Respondents also make the related argument that their claims had not yet arisen as of the time of the settlement, and therefore could not have been settled. Opp. 1, 6, 17. This argument ignores the fact that it is quite common for parties to release, in the course of a settlement, "not only those claims alleged in the complaint," but also claims "'based on the identical factual predicate as that underlying the claims in the settled class action even though the claim[s were] not presented *and might not have been presentable in the class action.*'" *Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992) (quoting *TBK Partners, Ltd.*

C. The Decision Below Fundamentally Misperceives The Proper Inquiry In Determining Whether A Class Representative Adequately Represented The Interests Of The Class.

Respondents' argument for allowing re-litigation of the question of adequacy of representation focuses on the contention (rejected by the district court but embraced by the court of appeals below) that in the prior adjudications of the question of adequacy, the courts should have required a separate subclass with separate counsel for plaintiffs whose injuries would manifest after 1994. Opp. 19. As noted in the Petition, however, this argument presumes that the question of adequacy involves a *post-hoc* assessment. Pet. 19-20. It does not. The adequacy determination involves asking whether the rights of individual unnamed class members—knowing whatever was knowable at the time—were fairly represented by the class representatives.

Properly understood, the "sub-class" on which Respondents focus (Opp. 1-2)—veterans who became ill after 1994—did not exist at the time of the settlement. Rather, the class as certified included all individuals who had been exposed to Agent Orange, but who had no manifested injury at the time. Some of those individuals would turn out to manifest injury before 1994; some only after 1994; and some

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v. *Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982)); *see also Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367 (1996) (holding that parties to state court settlement may release claims over which there is exclusive federal jurisdiction); *Williams* v. *General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 274 (7th Cir. 1998) (noting it is "not at all uncommon for settlements to include a global release of all claims past, present, and future, that the parties might have brought against each other" and also that "nothing in the Supreme Court's *Amchem* decision suggested that the federal courts lack the Article III *power* to settle future claims of class members") (citations omitted); 15A C.J.S. *Compromise & Settlement* § 42 (2002) (describing release of future claims); 66 AM. JUR. 2D *Release* § 28 (2001) (same).

never. Who fell into which category was impossible to ascertain at the time. Respondents are therefore flatly incorrect in arguing that as future claimants they were "completely dependent on persons with different interests to protect their rights." Opp. 16. To the contrary, all then-asymptomatic class members were situated similarly at the time of the settlement and had the same interests.[2] The only proper way to view adequacy is the way the district court did—to ask whether, in the face of present uncertainty, the class representatives adequately represented the interests of individuals who could not know whether, and if so, when, they would become sick. The court of appeals' fundamentally different mode of analysis sharply contrasts with the approach (correctly) adopted by the other courts of appeals to address the question, and calls out for this Court's review.

D. The District Court's Prior Determination Of Adequacy Is Entitled To *Res Judicata* Effect.

Respondents rely heavily on the proposition that collateral attack is generally permitted to challenge a judgment in circumstances in which affording *res judicata* effect to the judgment would violate due process. *See* Opp. 15. This argument, however, attacks a straw man; petitioners certainly do not take issue with that unremarkable proposition. To the contrary, as the Ninth Circuit properly held in *Epstein*, collateral review is permitted to determine whether the procedures by which a prior court determined that a class representative adequately represented the interests of nonnamed class members were sufficient. *See Epstein*, 179 F.3d at 648; Pet. at 14-15.

It is the court of appeals' remarkable and unwarranted expansion of the scope of this collateral inquiry that breaks

[2] Petitioners are unaware of any other case in which it has been held that a subclass was required even though it would have been impossible at the time to tell whether any individual class member belonged in the main class or the subclass.

with settled law and warrants this Court's review. *See Amicus Curiae* Product Liab. Advisory Council Br. 4 n.3 (urging this Court to grant review of this "circuit split"). Indeed, the decision to allow this type of collateral challenge is particularly jarring in view of the fact that in the *Ivy/Hartman* litigation the Second Circuit had itself previously (and correctly) rejected what is in substance the very same collateral attack, brought by nonnamed class members who, viewed at the time of settlement, were in precisely the same situation as respondents here—they had been exposed to Agent Orange but had not manifested injury. Thus, although the scope of permitted collateral review may properly be understood to encompass the question whether the trial court had afforded nonnamed class members proper procedural protection in reaching the conclusion that the class representatives were adequate, the court of appeals had already gone further in *Ivy/Hartman* to reject the very challenge presented here. No case cited by respondents holds that further collateral review is to be permitted in this circumstance. In view of the radical departure the court of appeals' decision marks from prior law, on a bedrock issue of constitutional law and civil procedure and on a matter of profound practical importance, review in this Court is required.

II. THE SECOND CIRCUIT'S DECISION CANNOT FAIRLY BE HARMONIZED WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The petition pointed to the sharp conflict between the decision below and the prior decisions of the Ninth, First, and Third Circuits. Although respondents (like the court below) make a passing effort to distinguish these cases, *see* Opp. 17-18, their attempt at harmonization only highlights the conflict. Specifically, respondents suggest four "differences" between the Second Circuit's decision and the decisions of the Ninth, First, and Third Circuits. None of these purported distinctions, however, was relied upon by those courts of appeals in reaching their decisions. At bottom, there is little doubt that the collateral attack the court below

allowed to proceed would have been rejected in the Ninth, First, and Third Circuits.

1. Respondents argue that *Epstein*, *Nottingham Partners*, and *Grimes* "never considered the question of whether a potential future claimant, whose interests were not adequately represented by present claimants, could bring a collateral attack." Opp. 17. The suggestion that these claimants "were not adequately represented," of course, assumes the conclusion—a conclusion that requires disregarding the *res judicata* effect of the district court's prior determination that all nonnamed class members were adequately represented. In any event, the asserted "distinction" between present claimants and future claimants cannot have formed the basis for the Second Circuit's decision, because the court did not purport to reject its prior decision in *Ivy/Hartman*, in which it held that those nonnamed class members (whose injuries had also not yet manifested as of the time of settlement, and were thus "future claimants" for the purposes of the distinction respondents draw) were adequately represented in the original settlement.

2. Respondents also argue that "*Epstein* and its forerunners explicitly permitted at least limited collateral attack . . . ." Opp. 17. This argument, again, is immaterial here; no doubt a challenge to the adequacy of the procedures employed by the trial court in approving the settlement would have been permissible—although surely futile. *See Epstein*, 179 F.3d at 648 (per O'Scannlain, J.) ("Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review."); *Nottingham Partners*, 925 F.2d at 33 ("a court-approved settlement containing a release may be applied against a class member who is not a representative member, even if that member objects to the settlement, so long as acceptable procedural safeguards have been employed") (footnote and citations omitted); *Grimes*, 17 F.3d at 1558 (opportunity for class members to be heard before settlement court and to then raised the issue on direct appeal "granted all the process that was due," both for class members who objected and those who did not).

The conflict arises not because under some different circumstances all would agree that a collateral attack could proceed, but because the other circuits plainly would not have countenanced the type of collateral attack permitted by the Second Circuit: a *de novo* review of the substance of the settlement, taking into account any intervening changes in the facts or the law as they relate to the circumstances of the dissatisfied class members.

3. Respondents' third argument—that "*Epstein* and its forerunners dealt with fully cognizable economic claims, rather than unaccrued personal injury claims" (Opp. 17)—is little more than a re-formulation of the first proffered distinction. There is, of course, no suggestion in *Epstein*, Nottingham *Partners*, or *Grimes* that the fact that the claims in those cases were "economic" formed any part of the basis for those courts' decisions. *Cf. Khan* v. *State Oil Co.*, 93 F.3d 1358, 1362 (7th Cir. 1996) (Posner, C.J.) ("It is not cricket to distinguish a precedent by pointing to a fact mentioned by the court in the previous opinion but clearly given no weight by it."), *vacated on other grounds*, 522 U.S. 3 (1997).

4. Respondents' final contention—that *Epstein*, *Nottingham Partners*, *and Grimes* were "based upon nuances of Delaware law" and the requirements of the Full Faith and Credit Act, 28 U.S.C. § 1738 (Opp. 17-18), and are therefore distinguishable—also lacks merit. The underlying issue in those cases was the same as the one here—the *res judicata* effect to be given to an earlier judgment when persons against whom the judgment is invoked claim that they were

not adequately represented in the prior proceeding.[3] The Second Circuit went about answering that question in a way that is fundamentally different from the approach taken by the Ninth, First, and Third Circuits, and that will have dramatic and infelicitous practical consequences, unsettling the finality of past class actions and diminishing the future utility of the class action device. Only a decision from this Court can resolve the disagreement among the courts of appeals.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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OCTOBER 2002

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[3] *Epstein*, *Nottingham Partners*, and *Grimes* all did share an element of complexity not present here—the requirement imposed by the Full Faith and Credit Act, 28 U.S.C. § 1738, of determining the preclusive effect that the judgment-rendering court (in each of those cases, the Delaware state courts) would assign to the class action settlements. But this point only exacerbates the conflict created by the court below; the Second Circuit did not simply err in failing to defer appropriately to another jurisdiction's preclusion law; it refused to accord finality to its *own* prior determination regarding adequacy of representation.

MOTION FILED

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No. 02-271

IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Product Liability Advisory Council ("PLAC") hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of petitioners. Consent to the filing of this brief has been obtained from counsel for the petitioners. Counsel for respondents have refused consent. Copies of the letters giving and refusing consent have been lodged with the Court.

PLAC is a nonprofit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 525 briefs as *amicus curiae* in both state and federal courts, including numerous briefs in cases presenting questions about the interpretation of the procedural rules governing class actions and class action settlements – questions at the heart of this case.

As frequent participants in, and observers of, class action settlements and litigation, PLAC's members have a real and concrete interest in the resolution of the questions presented in this case. In particular, PLAC and its members have grave concerns about the effect that the ruling below will have on the fair and efficient resolution of class disputes. By granting absent class members a broad right to bring collateral attacks to final class action judgments and settlements, the rule adopted by the court below threatens to upset the finality of countless class action dispositions, prevent conclusive

resolution of pending and future class actions, reduce the incentive for defendants to enter class action settlement agreements, and undermine the utility and basic fairness of the class action device. PLAC further believes these important questions of national importance warrant review because of the conflict among several lower courts of appeals, and because of the serious confusion these courts have faced interpreting this Court's applicable precedents.

For these reasons, PLAC respectfully requests that the Court grant the motion for leave to file the attached brief *amicus curiae* in support of the petition.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members had a full opportunity to opt out, object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class.

2. Whether, if collateral attack is permissible, the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of events and changes in the law occurring years after the settlement has become final and all of the settlement proceeds have been disbursed.

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IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,

Petitioners,

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DANIEL RAYMOND STEPHENSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the Product Liability Advisory Council as *amicus curiae* in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council ("PLAC") is a nonprofit association with over 100 corporate members representing a broad cross-section of American and interna-

[1] Consent from counsel for petitioners has been filed with the Clerk of this Court. Because counsel for respondents have refused to consent, this brief is accompanied by a motion for leave to file a brief as *amicus curiae*. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

tional product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 525 briefs as *amicus curiae* in both state and federal courts, including numerous briefs in cases presenting questions about the interpretation of the procedural rules governing class actions and class action settlements – questions at the heart of this case. As frequent participants in, and observers of, class action settlements and litigation, PLAC's members have a real and concrete interest in the resolution of the questions presented by the petition in this case.

INTRODUCTION

This case presents a question of profound importance in the class action arena: Is a class action judgment or settlement *ever* final? The Second Circuit answered "no." It did so not only by dramatically reopening the Agent Orange global settlement agreement, long thought a closed chapter of American legal history. In the process, the court also created a novel rule of law that affords absent class members a broad – and potentially boundless – right to collaterally attack a class action settlement on adequacy of representation grounds.

In the Second Circuit's view, it does not matter that the absent class members received notice and had a full opportunity to opt out of the proceedings; it does not matter that those members had an opportunity to raise objections relating to the adequacy of the class representatives to the trial court, but made no effort to do so; it does not matter that the trial court *expressly determined* that the class representatives were in fact adequate representatives of the entire class; it

does not matter that that determination was *expressly affirmed* (twice) on appeal, and that those decisions are no longer reviewable. For the court below, the *only* relevant consideration is whether the absent class member can articulate some reason why, with the full benefits of 20/20 hindsight and recent developments in the law, the representation appears less than fully adequate.

If upheld, the Second Circuit's ruling could, in principle, threaten to upset the finality of *every* class action settlement or judgment ever reached. And by radically destabilizing settled class action determinations, the court's rule would render the class action device a precarious (and thus highly undesirable) method for resolving disputes. It would, in effect, place a question mark after every "It is so ordered" entered on the Nation's class action docket. Yet it is precisely in the class action context that finality, repose, and voluntary settlements of disputes are perhaps most highly valued and urgently needed. In other words, the Second Circuit's decision erects a special class action collateral attack rule that will inevitably – and quite perversely – thwart the primary objectives of the class action device. Indeed, it is difficult to imagine a rule of law that would more seriously undermine the core utility and rationale of class actions.

No constitutional or statutory provision requires such a rule, no precedent of this Court supports it, and no sensible policy objective would be furthered by its adoption. The Court should grant the writ, resolve the conflict in the federal courts of appeals on this issue (and the related confusion arising from this Court's own precedents), and reject the Second Circuit's unjustifiable collateral attack rule.

REASONS FOR GRANTING THE WRIT

The petition persuasively demonstrates that the questions presented involve issues of profound national importance; that there is a conflict between the decision below and *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528

U.S. 1004 (1999),[2] *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), and *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994);[3] and that the

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[2] The Second Circuit suggested that its collateral attack rule was, in fact, consistent with the rule announced in *Epstein*. App. 14a n.7. Nothing could be further from the truth. *Epstein* squarely held that collateral review of a prior adequacy of representation determination is barred where the prior court afforded the class member a full and fair opportunity to participate in the proceeding. *See Epstein*, 179 F.3d at 648-49. The court below attempted to reconcile its holding with *Epstein* by explaining that "neither the district court nor this Court has determined the adequacy of representation *with respect to these plaintiffs* whose injuries did not arise until after the settlement expired." App. 14a n.6 (emphasis in original). But that claim is demonstrably false because, as the court elsewhere conceded, App. 13a, the district court and the Second Circuit previously concluded in this litigation that the *entire class* was adequately represented – a conclusion that necessarily embraces a determination of adequacy "with respect to these plaintiffs." In any event, *Epstein* only requires *an* adequacy determination pursuant to fair procedures, not a *correct* or *complete* adequacy determination The Second Circuit's obvious sleight of hand cannot minimize the direct conflict between the two courts' holdings.

[3] The decision in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), is fairly read to support the Second Circuit's collateral attack rule, as the Second Circuit itself thought, App. 15a, thus deepening the circuit split on the question presented in the petition. As Petitioners suggest, Pet. 10 n.3, *Gonzales* can be distinguished in part on the ground that the allegedly inadequate representation in that case took place exclusively *after* termination of the initial lawsuit – a factual scenario not present in this case. But the court in *Gonzales* adopted a clear rule authorizing collateral attacks on the propriety of the initial adequacy determination. *See Gonzales*, 474 F.2d at 72 (collateral attack inquiry includes questioning whether "the first suit correctly determine[d], initially, that the representative would adequately represent the class"). That is the very rule that the Second Circuit adopted and applied below. *Compare also King v. S. Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 530 (6th Cir. 1986) (holding that "adequacy of representation is a factual finding for the court before whom the class action is pending," and rejecting collateral attack on that basis).

Second Circuit's rule is inconsistent with settled principles of *res judicata* and the finality of judgments.

Instead of reiterating those arguments here, *amicus* PLAC will advance three additional, related reasons why the Court should grant the writ. *First*, if adopted as the law of the land, the Second Circuit's collateral attack rule would threaten to upset the finality of every class action settlement or judgment reached to date. In addition, it would preclude any truly final resolution of class action disputes in the future, create tremendous disincentives for parties to enter into settlement agreements, and undermine core objectives of the class action procedural device. The Court should grant the petition to prevent these serious, adverse consequences.

Second, the petition should be granted to prevent a radical expansion of this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). According to the Second Circuit, its collateral attack rule necessarily requires an examination of past adequacy of representation determina-

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The question presented in this case has also generated a lively debate in the academic literature. *Compare* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765 (1998) ["Kahan & Silberman I"] (rejecting broad collateral attack rule); William T. Allen, *Finality of Judgments in Class Actions, A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 1149 (1998) (same); Geoffrey P. Miller. *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. Rev. 1167 (1998) (same), *with* Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Tex. L. Rev. 383 (2000) (defending collateral attack); Alan B. Morrison, *The Inadequate Search for "Adequacy" in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. Rev. 1179 (1998) (defending limited collateral attack, and disputing alleged adverse consequences of such attacks); *see also* 18A Charles Alan Wright, et al., *Federal Practice and Procedure* § 4455, at 485-86 (2d ed. 2002) (criticizing *Epstein* remand decision for ignoring traditional preclusion principles in adopting collateral attack bar for efficiency purposes).

tions pursuant to current legal standards, as articulated by this Court in *Amchem*. Yet *Amchem* plainly did not authorize the reopening of long-finalized class action judgments for *de novo* review to determine compliance with *Amchem*'s standards. If the Second Circuit's collateral attack rule remains the law, it would, in effect, inappropriately expand the substantive reach of *Amchem* itself.

Third, the Second Circuit's ruling presents serious interpretive questions about the meaning of three of this Court's precedents: *Hansberry v. Lee*, 311 U.S. 32 (1940), *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996). This interpretive confusion has, in important ways, contributed to the conflict among the circuits on the questions presented in the petition. Indeed, lower courts have read the very same decisions of this Court to support *both* the rule permitting collateral attacks *and* the rule barring them. Because only this Court can explain the meaning of its own precedents, awaiting additional interpretive glosses by the lower courts would serve no evident purpose, and simply delay resolution of the existing conflict on an issue of tremendous national importance.

I. A BROAD RIGHT TO RELITIGATE ADEQUACY OF REPRESENTATION ISSUES WOULD THREATEN THE FINALITY OF COUNTLESS CLASS ACTION DECISIONS, SUBVERTING CORE CLASS ACTION PURPOSES.

The decision below disrupts one of the most noteworthy class action settlements on record. It does so despite nearly two decades of reliance on the finality of the settlement – reliance created and sustained through extensive judicial proceedings. Those judicial proceedings expressly and exhaustively resolved, on multiple occasions, the very subject matter of the plaintiffs' complaint here – the adequacy of the

class representation. Still worse, those proceedings were conducted and approved by the very court that has now, years later, reached a different view in the very same case. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 167 (2d Cir. 1987), *cert. denied*, 487 U.S. 1004 (1988); *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994).

Yet the inequities here, serious though they may be, are but the tip of the iceberg. In principle, the rule of law that the court announced could permit dissatisfied class members to wage collateral attacks on any and all class action decisions – whether reached in state or federal court, and whether reached last week, last decade, or perhaps even a quarter-century ago. The only requirement is that the plaintiff mounting the collateral attack assert, on the basis of subsequent developments or new legal standards not applicable at the time the class originally was certified, that his or her particular interests were not adequately represented.[4] And the only discernible protection for class action defendants would be the purely accidental fact that, in some cases, there may be no class members who wish to bring such an attack.

But that is cold comfort indeed, and plainly insufficient given the judiciary's core obligation to secure the finality of legal judgments. *See, e.g., Southern Pac. R. Co. v. United*

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[4] To be sure, a mere allegation of inadequate representation would not suffice to reopen a case; the plaintiff still must prove that the representation was in fact inadequate. But the serious risk to finality and repose is created by the very *willingness* of courts to entertain the collateral attack in the first place. This is especially so given that adequacy of representation determinations often involve complex, fact-specific judgment calls, presenting the very real risk that the collateral court, with no first-hand knowledge of the class proceedings, may frequently err when asked to second-guess (many years later) the initial adequacy determination. *See* Kahan & Silberman I, *supra*, at 789 n.104 (uncertainty "about when the standard of 'adequate representation' has been met underscores the need to limit the availability of collateral attack").

States, 168 U.S. 1, 49 (1897) (Harlan, J.) ("Th[e] general rule [of *res judicata*] is demanded by the *very object for which civil courts have been established*, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination") (emphasis added). That obligation serves fundamental principles of societal justice,[5] and must take precedence *even* over claims that equity or unforeseen circumstances suggest a different result in a particular case. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) ("'Simple Justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of *res judicata* serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case."); *Reed v. Allen*, 286 U.S. 191, 199 (1932) ("mischief which would follow the establishment of precedent for . . . disregarding this salutary doctrine against prolonging strife *would be greater than* the benefit which would result from relieving some case of individual hardship") (emphasis added).

The Second Circuit's rule threatens not only the finality of class action decisions past, but all pending and future class proceedings as well. Without some secure promise of finality, class actions will lose much – if not all – of their utility as a dispute resolution mechanism. No matter how diligently the litigants or the court attempt to craft a fair resolution of a class conflict – including sustained efforts to ensure the adequate representation of absent class members – substantial doubts as to the binding effect of any determination would

[5] *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 400 (1981) (*res judicata* is a rule of "fundamental and substantial justice" and a rule "'of public policy and of private peace'" (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)); *Reed v. Allen*, 286 U.S. 191, 198-99 (1932) (doctrine of *res judicata* was "conceived in the light of the maxim that the interest of the state requires that there be an end to litigation – a maxim which comports with common sense as well as public policy").

remain. There would always be a risk – as demonstrated in this very case – that some absent class member might emerge years later to announce his discontent for the first time. *See* Miller, *supra*, at 1189 ("All class action settlements, however generous to the class, however competently litigated, and however much the product of adversarial, arm's length negotiations between the parties, would be open to collateral attack in a subsequent forum. There is nothing the parties in the first forum can do to prevent this danger.").

Moreover, the collateral attack rule gives class members a powerful incentive to remain silent during the class action proceedings, and to complain about perceived inadequacies of representation only if the relief obtained by the rest of the class later seems inadequate. *See id.* Such an incentive would be grossly unfair insofar as it gives class members, in effect, a choice of remedies and an all too tempting opportunity for strategic behavior. In addition, it would deprive the certifying court of information that it needs to reach a fair and complete adequacy determination. Thus, the collateral attack rule promises *numerous* adequacy of representation findings by multiple courts – *none of which* will be as reliable as the determination that the certifying court could make *if* collateral attacks were barred. In the words of the leading academic critics of the collateral attack rule, the far better approach is to "Do it once, but do it right." Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller & Morrison*, 73 N.Y.U. L. Rev. 1193, 1199 (1998).

The destabilizing aspects of the Second Circuit's rule are particularly harmful when one considers its effect on a litigant's incentive to settle. In a litigation context, the loss of certainty that the Second Circuit's rule would engender is costly enough. But those costs are magnified considerably because that very uncertainty will also remove much – if not all – of a class defendant's incentive to reach a global settle-

ment of class claims. Why would any rational defendant agree to settle if it cannot achieve peace and repose? At the very least, the risk that a class settlement might be disturbed, years later, by a now-silent class member will substantially discourage defendants from entering into any class settlement. *See* Kahan & Silberman I, *supra*, at 779 & n.66 (possibility of one successful collateral attack, however weak its merits, creates a "potential for double liability [that] will increase the expected liability of defendants and severely impede the ability to settle a class to start with").

Finally, the Second Circuit's rule is especially troubling because it undermines core objectives of the class action procedural device. One of those core objectives is to prevent duplicative litigation of the same basic issues – streamlining complex and multiparty litigation into a single proceeding. That streamlining, and the judicial efficiencies that result, can occur only if the single class proceeding is a conclusive and binding one. The Second Circuit's broad collateral attack rule directly threatens that core, class action objective by sanctioning – indeed by promoting – duplicative litigation of the adequacy of representation issue. In other words, the Second Circuit's collateral attack rule is, perversely, a special rule for class actions that actually fosters one of the key problems class actions were designed to solve. *See* Linda Silberman, *The Vicissitudes of the American Class Action—With A Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201, 214 (1999) (collateral attacks on adequacy determinations "represent serious danger to the finality that is the essence of class litigation and settlements"); Kahan & Silberman I, *supra*, at 779 ("From the perspective of efficiency . . . multiple determinations of the same issue undermine the very efficiencies sought to be achieved by the class action mechanism"); Allen, *supra*, at 1159-60 (collateral attacks "reinvent[] the problem of inefficiency and second guessing that is solved by the rule of finality and recognition of judgments").

Likewise, many courts have recognized that the general public policy favoring voluntary settlements is paramount in the class action context because of the administrative burdens that complex class litigation imposes on the courts. *See Bano v. Union Carbide Corp.*, 273 F.3d 120, 129 (2d Cir. 2001) ("public interest in amicable resolution of cases is particularly strong in the context of mass tort and similar litigation"); *In re Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000) ("general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions"), *cert. denied*, 533 U.S. 903 (2001); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995) (noting "urgency of [public] policy [favoring settlements] in complex actions that consume substantial judicial resources and present unusually large risks for the litigants"). Yet despite the pressing nature of this public policy concern in the class action context, the Second Circuit's collateral attack rule makes voluntary settlement of class actions uniquely difficult to achieve.

Given all of these difficulties, there can be no real question that the Second Circuit's rule poses a serious threat to the viability of the class action procedural device. The real question is whether there is *any* possible justification for such a rule. And on this central question, the Second Circuit provided no answer whatsoever. The truth is that the collateral attack rule will do little else but preclude any hope of finality in class action proceedings; encourage strategic behavior by absent class members; deprive certifying courts of information necessary to render a considered and complete adequacy determination; and remove the incentive to enter class action settlement agreements. *All* of those consequences can be avoided simply by requiring absent class members to make their adequacy of representation objections known to the certifying court. If they fail to do that, despite a full and fair opportunity to do so, that should be the end of

the matter.[6]

II. THE DECISION BELOW WOULD INAPPROPRIATELY EXPAND THE REACH OF THIS COURT'S *AMCHEM* DECISION.

Petitioners rightly criticize the court below, not only for permitting a collateral attack, but for resolving that attack by applying legal standards of adequate representation derived from this Court's recent decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). Those decisions emphasized the certifying court's responsibility to provide "structural assurance[s] of fair and adequate representation for the diverse groups and individuals affected" by a class action settlement. *Amchem*, 521 U.S. at 626; *Ortiz*, 527 U.S. at 856. With this emphasis, and with *Amchem*'s related holding that settlement-only class actions must satisfy the procedural prerequisites necessary to certify a class for trial, *see Amchem*, 521 U.S. at 613-22,[7] *Amchem* "heralded a new era of judicial scrutiny of class action certification and settlement." *Epstein*, 179 F.3d at 651 (Thomas, J., dissenting); *see Ortiz*, 527 U.S. at 856 ("it is obvious *after Amchem*" that subclasses with separate representation are needed to eliminate

[6] To be sure, exceptions may be appropriate in certain circumstances, such as where the initial determination of representational adequacy was based on material misrepresentations. *See* Kahan & Silberman I, *supra*, at 782. However, no such circumstances are present here, and the Second Circuit's collateral attack is plainly not so limited.

[7] Prior to *Amchem*, the majority rule in the lower courts was that a settlement-only class action need not satisfy ordinary class action prerequisites. Instead, courts were charged with ensuring that settlements were "fair, adequate and reasonable." *See, e.g., Plummer v. Chem. Bank*, 668 F.2d 654, 658 (2d Cir. 1982); *see also Amchem*, 521 U.S. at 618, 621-22 (noting that only one federal circuit had taken the contrary approach adopted by the Court in *Amchem*, and holding that federal courts lacked power to substitute for Rule 23's prerequisites the rule that "if a settlement is 'fair,' then certification is proper").

conflicting interests and to provide structural assurance of fair and adequate representation") (emphasis added).

Whether or not the adequacy findings in this case could survive scrutiny under this new legal regime – the Second Circuit held they could not, App. 18a-19a – begs the question whether it is appropriate to engage in that sort of retrospective analysis in the first place. Plainly, it is not. Most obviously, it creates the strong possibility that collateral courts will, as in this very case, simply rewrite legal history and settled judgments, rendering legally insufficient adequacy decisions that were *completely valid* under the law applicable at the time they were reached. In the case of pre-*Amchem* settlement-only class actions, where there was no requirement for a full-blown certification analysis, *see supra* n.7, it is doubtful that *any* express adequacy of representation determination could survive the kind of rigorous scrutiny that we have come only recently to expect. *See, e.g., Ortiz*, 527 U.S. at 856; *see also Amchem*, 521 U.S. at 618 (noting pre-*Amchem* standard that "adequacy of class representation . . . is ultimately determined by the settlement itself" (quoting *White v. Nat'l Football League*, 41 F.3d 402, 408 (8th Cir. 1994)). In short, the retroactive application of current legal standards significantly compounds the problems inherent in a collateral attack rule. It ensures that, however many class judgments and settlements ultimately are collaterally attacked, a good many of those attacks are bound to succeed solely because of a change in the applicable legal standards.

Accordingly, Petitioners persuasively argue (in the Second Question Presented) that *if* collateral attacks are deemed permissible in certain circumstances, then such challenges should be based on the facts and law that existed at the time the first adequacy determination was made. Pet. 19-25. To the extent collateral attacks are permitted at all, such a modification of the Second Circuit's rule would certainly be necessary. But it is important to understand that, in the Second

Circuit's view, the retroactive application of the *Amchem* decision followed *inevitably* from its decision to permit the collateral attack in the first place. Were there any doubt on that score, the first sentence of the Second Circuit's opinion makes plain its intent: "This appeal requires us to determine the effect of the Supreme Court's landmark class action decision in *Amchem* . . . and *Ortiz* . . . on a previously settled class action concerning exposure to Agent Orange during the Vietnam War." App. 1a-2a.

Because retroactive application of current adequacy of representation standards (here, *Amchem*'s standards) is part and parcel of the Second Circuit's rule permitting collateral attacks, the case for reviewing that rule (and for rejecting it outright) becomes all the more persuasive. Nothing in *Amchem* remotely suggests that this Court intended its decision to have an "effect" on *any* "previously settled class action[s]." App. 1a-2a. Indeed, any such intention would have been extraordinary, and contrary to foundational principles limiting retroactive application of new decisions to *pending* cases. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). If permitted to stand, the Second Circuit's collateral rule would effect a dramatic expansion of *Amchem*'s substantive reach, compelling application of that decision to long-finalized, class dispositions that were plainly beyond the scope of *Amchem*'s holding. That alone is reason to grant the writ.

III. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE SERIOUS INTERPRETIVE CONFUSION ARISING FROM ITS OWN PRECEDENTS.

The decision below raises serious interpretive questions about the meaning of three of this Court's own precedents: *Hansberry v. Lee*, 311 U.S. 32 (1940), *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985), and *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996). In-

deed, the conflict in the lower courts on the permissibility of collateral attacks arises in important respects from that very interpretive confusion. The confusion in this area is so pervasive that, in several instances, the lower courts have read the very same opinion of this Court to support *both* the rule permitting collateral attacks *and* the rule barring them. Because only this Court can explain the meaning of its own precedents, no purpose would be served in awaiting additional interpretive glosses by the lower courts. The Court should grant the writ now and resolve both this interpretive confusion and the circuit conflict that it has produced.

Hansberry v. Lee. The Second Circuit based its broad authorization of collateral attacks on this Court's seminal decision in *Hansberry v. Lee*, 311 U.S. 32 (1940). The Court in *Hansberry* permitted a collateral attack on a state court class action and held that class action judgments can only bind absent class members where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation." *Id.* at 41. In the view of the court below, *Hansberry* stands for the broad proposition that collateral attacks based on inadequacy of class representation are permissible, and thus "amply support[s]" the "propriety of a collateral attack" such as that brought by respondents. App. 14a.

By contrast, in *Epstein*, the Ninth Circuit read the very same case to support the contrary rule that the *only* permissible collateral attack is one challenging the procedures employed by the initial court. The court based that conclusion on *Hansberry*'s holding that "there has been a failure of due process *only* in those cases where it cannot be said that the *procedure adopted*, fairly insures the protection of the interests of absent parties who are to be bound by it." *Epstein*, 179 F.3d at 648 (quoting *Hansberry*, 311 U.S. at 42)). In other words, the Ninth Circuit thought its "procedures-only"

collateral attack rule followed from *Hansberry*'s understanding of the due process guarantee of adequate representation. *Epstein*, 179 F.3d at 648 ("Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review").

Hansberry obviously cannot support two diametrically opposed collateral attack rules at the same time. But which reading of *Hansberry* is correct? Only this Court can decide, and it is essential that it do so now.

Phillips Petroleum v. Shutts. The court below also thought that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), supported its broad collateral attack rule in two respects. First, it pointed to the Court's statement in *Shutts* that "a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment," *Shutts*, 472 U.S. at 805 – a statement it read to suggest that a collateral attack must be available to examine the legal propositions that would be necessary in order to afford a prior judgment preclusive effect. App. 14a. In addition, the Second Circuit placed emphasis on *Shutts*' statement that "the Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members," *Shutts*, 472 U.S. at 812 (emphasis added) – a statement it apparently read to support the permissibility of continued collateral attacks to test the adequacy of representation, even long after the litigation terminates. App. 18a; *see also Matsushita*, 516 U.S. at 395-96 (Ginsburg, J., concurring in part and dissenting in part) (reading phrase "at all times" to mean that the "class representative's duty to represent absent class members adequately is a continuing one," and therefore supports the proposition that final class action judgments "remain vulnerable to collateral attack for failure

to satisfy the adequate representation requirement").

Not surprisingly, the Ninth Circuit in *Epstein* declined to read *Shutts* that broadly. It observed that "nowhere in *Shutts* did the Court state or imply that where the certifying court makes a determination of the adequacy of representation in accord with *Shutts*, this determination is subject to collateral review." *Epstein*, 179 F.3d at 648. But far from concluding that the collateral attack issue was therefore open under *Shutts*, the Ninth Circuit went on to derive from that very opinion the *opposite conclusion*. It said that "*Shutts* in fact implies that [collateral] review is unwarranted by emphasizing that the certifying court is charged with protecting the interests of the absent class members." *Id.* at 648.[8]

Again, which reading of *Shutts* is correct? The answer to that question impacts significantly the proper resolution of the question presented in this case. Because only this Court can answer that question definitively, its guidance is needed now.

Matsushita Electric Industrial Co. v. Epstein. In *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), this Court held that a state court global settlement must be given preclusive effect in federal court under the Full Faith and Credit Act, even where the state court settlement releases claims within the exclusive jurisdiction of the federal courts. What is far less clear is whether, in reaching this holding, the Court (i) necessarily determined that the representation in the state court judgment was constitution-

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[8] To make matters yet more complex, some academic commentators have interpreted *Shutts*' recognition of the certifying court's duty to protect absent class members' rights as a powerful demonstration of the need for collateral review. On this view, *Shutts*' emphasis on the certifying court's protective role removes the obligation on a class action plaintiff (unlike a defendant) to "fend for himself" to protect his interests, *Shutts*, 472 U.S. at 809 – the very obligation that a bar on collateral attacks effectively would impose. *See* Woolley, *supra*, at 394-96.

ally adequate, and (ii) if so, whether the *way* in which the Court made that determination is incompatible with a collateral attack rule.

On remand from this Court, the Ninth Circuit in *Epstein* interpreted the majority opinion in *Matsushita* to resolve both of those questions in the affirmative. It said that, despite certain indications in *Matsushita* that the majority may not have resolved the adequacy of representation issue, *Matsushita*, 516 U.S. at 379 n.5; *id.* at 389 (Ginsburg, J., concurring in part and dissenting in part), the only sensible conclusion was that the Court had in fact resolved the issue. If the majority opinion had concluded that the Full Faith and Credit Act gave preclusive effect to the state court settlement *without* first concluding that the state court settlement satisfied due process requirements (including adequacy of representation), the Ninth Circuit reasoned, the Court's conclusion would have been "purely hypothetical." *Epstein*, 179 F.3d at 646. And the Court in *Epstein* refused to "presume that the Court violated Article III by rendering an advisory opinion." *Id.* Moreover, the Ninth Circuit found ample evidence in the majority opinion that the Court had in fact assured itself that the "due process requirements necessary to bind absent class members were met." *Id.* at 645.

Most importantly for present purposes, *Epstein* further explained that the method this Court used to reach that implicit judgment was plainly inconsistent with a broad collateral attack rule. *See id.* at 649 (noting that the Court satisfied itself that the class had been adequately represented in the state court proceeding "*by referencing the Delaware courts' findings on these matters*, rather than by independently determining whether the requirements were met").[9] As the

[9] The court in *Epstein* also emphasized this Court's statement that the class members had advanced an adequacy of representation argument "*in spite of* the [state court's] express ruling, following argument on the issue, that the class representatives fairly and adequately protected the

court in *Epstein* summarized the point: "*Matsushita* itself indicates that broad collateral review of the adequacy of representation . . . is not available." *Id.* at 649.[10]

The Second Circuit, however, did not even mention *Matsushita* in considering whether collateral attacks are permissible. Did the court share Justice Ginsburg's view that the majority in *Matsushita* left the question open? *See Epstein*, 179 F.3d at 652 (Thomas, J., dissenting) (claiming that panel majority rested on "nuances" from this Court's opinion that "cannot bear the weight placed on them"). Did it have some other reason for thinking *Matsushita* inapplicable? We do not know, because the court did not offer an explanation. What we do know is that the rule the Second Circuit ultimately adopted is, in the view of the Ninth Circuit, inconsistent with this Court's holding in *Matsushita*. Whether that

interests of the class." *Matsushita*, 516 U.S. at 379 n.5 (emphasis added); *Epstein*, 179 F.3d at 650 (explaining that that statement, and others, "indicated that the Epstein appellants' challenge to the adequacy of representation in the Delaware proceedings was answered by specific reference to the findings made on the issue in those proceedings").

[10] By contrast, three Justices in *Matsushita* appeared to support the view that collateral attacks based on inadequate representation must be permitted. *See Matsushita*, 516 U.S. at 395-96 (Ginsburg, J., concurring in part and dissenting part, joined by Stevens, J., and Souter, J.) (although states have "first line responsibility" to conduct adequacy of representation inquiry, "[f]inal judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement"); *see also id.* ("A court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested *only in a subsequent action*) (emphasis added). Yet, that same opinion purported *not* to address the "counterargument that the issue of adequate representation was resolved by full and fair litigation in the Delaware Court of Chancery," *id.* at 399 – a counterargument that seems identical to the position ultimately taken by the court in *Epstein* on remand, and rejected by the Second Circuit below. The majority in *Matsushita* did not expressly discuss these apparently conflicting statements; to the extent it spoke to them at all, it spoke, as *Epstein* concluded, implicitly through its judgment.

conclusion ultimately is correct, it appears that one *must* interpret *Matsushita* properly in order to decide whether collateral attacks are permissible. The Second Circuit's silence on the question of *Matsushita's* applicability simply adds to the interpretive confusion.

In light of the pattern of decisions thus far, awaiting further lower court efforts to resolve the interpretive confusion about this Court's precedents would serve no purpose. The Court should act now to provide much needed guidance on these questions of profound national importance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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DEC 18 2002

CLERK

In the Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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10. Stipulation of Settlement dated May 7, 1984 in *In re Agent Orange Product Liability Litigation*, MDL No. 381 88

11. Settlement Agreement signed by class and defense counsel, filed June 11, 1984 in *In re Agent Orange Product Liability Litigation*, MDL No. 381 90

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13. Objections of William P. Stimson to Proposed Settlement of Class Action dated July 26, 1984, in *In re Agent Orange Product Liability Litigation*, MDL No. 381 and *Ryan v. Dow Chemical Co.*, No. 79 C 747. 122

14. Transcript excerpt of Aug. 10, 1984 hearing before Chief Judge Weinstein in *In re Agent Orange Product Liability Litigation*, MDL No. 381 [pp. 702-03, 724-25, 729-34, 736-40, 769] 126

15. Memorandum in Support of Plaintiffs' Motion Pursuant to Rules 52(b) and 59(e) to Reconsider the Order of January 7, 1985 Which Approved the Settlement, filed Mar. 7, 1985 in *In re Agent Orange Product Liability Litigation*, MDL No. 381 [pp. 93-97, 117-18, 155-73, 174-201] 137

16. Transcript excerpt of Mar. 18, 1985 hearing before Chief Judge Weinstein in *In re Agent Orange Product Liability Litigation*, MDL No. 381 [pp. 1, 5-8, 48-56, 70, 75, 81-82] 183

17. Excerpt of Appellants' Reply Brief dated Mar. 25, 1986 in *In re Agent Orange Product Liability Litigation*, No 84-6273 et al. in the United States Court of Appeals for the Second Circuit [pp. 15-17] 195

18. Civil Action Complaint filed July 17, 1998 in *Isaacson v. Dow Chemical Co.*, No. OCN-L-2415-98 in the Superior Court of New Jersey 199

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20. Exhibits to Sept. 21, 1998 Plaintiffs' Motion for Remand filed in *Isaacson v. Dow Chemical Co.*, Civ. No. 3-98-03988 (AET), in the United States District Court for the District of New Jersey 234

21. Affidavit of Daniel Raymond Stephenson dated May 21, 1999, filed in *In re Agent Orange Product Liability Litigation*, MDL No. 381 243

22. Defendants' Notice of Motion for Dismissal with Prejudice dated Oct. 12, 1999 in *Ryan v. Dow Chemical Co.*, No. 79 C 747; *In re Agent Orange Product Liability Litigation*, MDL No. 381; *Isaacson v. Dow Chemical Co.*, Civ. No. 98-6383; and *Stephenson v. Dow Chemical Co.*, Civ. No. 99-3056 245

23. Affidavit of Steven Brock in Support of Defendants' Motion to Dismiss with excerpts of attachments 248

24. Excerpts of attachments to Opposition of Plaintiff Joe Isaacson to Defendants' Motion to Dismiss 290

25. Notice of Appeal filed Mar. 10, 2000 in *Isaacson v. Dow Chemical Co.* with attached Order of Dismissal 326

26. Notice of Appeal and Amended Notice of Appeal in *Stephenson v. Dow Chemical Co.*, filed Apr. 7, 2000 and May 8, 2000 331

27. Letter from Steven Brock to Ms. June Lowe dated Apr. 6, 2000 and enclosing for Judge Weinstein's signature an Order and Judgment with attached transcript of proceedings in *In re Agent Orange Product Liability Litigation*, MDL No. 381; *Isaacson v. Dow Chemical Co.*, Civ. No. 98-6383; and *Stephenson v. Dow Chemical Co.*, Civ. No. 99-3056 337

Excerpts of Docket Sheet for MDL No. 381
In re AGENT ORANGE PRODUCT LIABILITY LITIGATION

* * * *

[Page 3]

Date	NR	PROCEEDINGS
8-15-79		Stipulation of dismissal of deft Northwest Industries Inc and its subsidiaries with prejudice in all actions except Kahler -v- Dow Chemical et al, (79 C 922) filed by counsel for pltff and counsel for deft Northwest Industries Inc., (unsigned by the Court). km (51)
8-15-79		Stipulation of dismissal of deft Northwest Industries Inc. and its subsidiaries w/o prejudice to the remaining defts and to whatever rights they may have against Northwest Industries Inc. filed by counsel for defts Diamond Shamrock Corp., Monsanto Co:, Hercules, Inc. and North American Philips (not signed by the court). km (52)
8-17-79		Second amended verified complaint filed. km (53)
8-17-79		Letter dtd 7-19-79 to J.Pratt from Sidley & Austin in re: dismissal of actions against Northwest Industries filed. km (54)
8-20-79		Letter dtd 8-16-79 to J. Pratt from Leonard L. Rivkin in re: service of documents by pltff on defts filed. km (55)
8-23-79		Notice of appearance of Blackwell, Sanders, Matheny, Weary & Lombardi as co-counsel w/ Clark, Gagliardi & Miller for deft North American Philips Co. filed. km (56)

Date	NR	PROCEEDINGS
9-14-79		Notice of motion ret 10-3-79 for an order dismissing the second amended verified complaint for lack of jurisdiction over subject matter filed w/memo in support. km (57, 58)
9-17-79		Notice of motion ret. 10-3-79 for summary judgment in favor of deft North American Philips Corp. filed with memo in support. km (59,60)
9-__-79		Pltff's memo of law opposing defts' motion to dismiss filed km (61)
9-_-79		Pltff's cross-motion v. deft North American Philips Corp. filed km (62)
9-_-79		Pltffs' notice to produce certain documents or deny the existence thereof by deft North American Philips Corp. filed with Pltffs' notice to deft North American Philips Corp. to admit or deny certain facts km (63, 64)
9-26-79		Memo of North American Philips on class certification filed. km (65)
9-26-79		Dow Chemical Co.'s memo of law in opposition to certification of pltffs' action a class action filed km (66)
9-27-79		Defts' memo in response to pltff's motion for class certification filed by Diamond, Shamrock, Hercules Inc. and Monsanto km (67)
10-9-79		Reply memo of law in support of defts' motion under Rules 12(b) and 12(f) with respect to the second amended verified complaint filed. km (68)
10-9-79		Deft North American Philips' further memo on its motion for summary judgment filed with affidavit of Lawrence T. D'Aloise, Jr. km (69,70)

Date	NR	PROCEEDINGS
10-15-79		Letter dtd 10-14-79 to J. Pratt from Victor J. Yannacone, Jr. in re: filing of a third amended verified complaint filed. km (71)
10-15-79		Third amended verified complaint filed. (TAVC) km (72)
10-17-79		Pltffs' reply memo on class certification filed/ km (72)
10-18-79		Affidavit of service of third amended verified complaint filed. km (72)
10-26-79		Stenographer's transcript dtd 10-3-79 filed. km (7_)
10-26-79		Dow Chemical Co.'s reply memo in opposition to certification of pltffs' action as a class action filed. km (7_)
10-29-79		Notice of appearance of deft Thompson-Hayward Chemical Co. to be represented by Clark, Gagliardi & Miller filed with consent to substitution in the place and stead of deft North American Philips Corp. km (77)
10-_-79		Certified copy of conditional transfer order from MDL Panel directing transfer case C.A. No. 79-3460 from ED of Pennsylvania to EDNY for inclusion in MDL #381 filed. (EDNY docket #: 79 C 2752) km (__)
10-26-79		Certified copy of conditional transfer order and cover letter sent to USDC for the ED of Pennsylvania. km

* * * *

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nt down rules for the filing of objections to the special masters ruling;
The Special masters' ruling dtd 8-5-82 is affirmed., filed. c/m gv (973)

26-82 Consent and waiver pursuant to pretrial order No. 38, filed. gv (974)

30-82 Ltr of Thomas A. Beck to Pratt, J., dtd 8-20-82, in re of pretrial order No. 38 to be clarified, filed. gv (976)

30-82 Stenographers transcript of 8-24-82, filed. gv (976)

30-82 By Pratt, J., dtd 8-25-82, Pretrial Order No. 40, that Uniroyal's motion from pretrial order 38 is denied without prejudice to renewal at future dtd if changed circumstances would warrant a changed result, filed. c/m gv (977)

7/82 Stenographer's transcript dated 9/2/82 filed ajh (978)

7/82 Stenographer's transcript dated 9/2/82 filed ajh (979)

9-82 Govt's copy of deposition to be held, of Robert J. Anderson 9-8-82, Warren Shaw 9-9-82, filed. gv (980)

9-82 Response of Riverdale Chem. Co. to pltffs' request for expedited answers regarding its proposed discovery order served 4-29-82, filed. gv (981)

9-82 Riverdale Chem. Co.'s response to pltffs' notice of insurance disclosure, filed. gv (982)

9-82 Reply memorandum of law in further support of the application of CBS Inc. for access to documents, filed. gv. (983)

9-82 Stenographers transcript of 9-7-82, filed.

gv (984)

20/82 Stenographer's transcript dtd 9/16/82, filed. jk (985)

20/82 Pltffs' Notice of Appeal from Order of Special Master Concerning Insurance, filed w/affidavit of Edward F. Hayes III. jk (986)

20/82 Pltffs' Memorandum in support of motion to discover insurance Appeal matters, filed. jk (987)

20/82 Memorandum of Law in support of the Application of CBS Inc. for access to documents and in support of appeal by CBS Inc from the Special Master's ruling, filed. jk (988)

20/82 By Pratt, J. Pretrial Order N. 41, dtd 9/16/82, that pltffs' motion for leave to file an amended complaint is granted, and the amendments to the complaint contained in Docket paper #3 are deemed incorporated in the complaint. (CV 81-0318) No further service of the amendments is required, filed. jk (989)

13/82 * Before Schreiber, Special Master. Case called. Counsel present (pltffs, defts and Gov't). Conf. Held and concluded. Next conf. to be held on 5/19/82 in Uniondale. Pltffs' motion to obtain depositions in Shoecraft denied. Pltffs' motion to direct defts to produce transcripts at EPA hearing granted. Pltffs' Motion to make audiotapes of depositions denied. Jk (---)

19/82 * Before Schreiber, Special Master. Case called. Counsel present. Conf. held and concluded. Next conf. to be half on 6/2/82 in Washington, D.C. Depositions closed until someone proves to court they

be open - Gov't position in 10 days. Defts requests for Gov't producdtion of Edgewood documents - Gov't will response. Jk (--)

2 * Before Schreiber, Special Master. Case called. Counsel present. Conf. held and concluded. Next conf. to be held on 6/4/82 in Uniondale. Pltffs' motion for production of defts' insurance agreement - Decision reserved. Defts' request for Special Master's attendance at 1st Dep. of gov't witness - granted. Pltffs' motion for "Voir Dire" of gov't witnesses denied. Van Sim deposition for June 23. jk (---)

* * * *

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12/21 1621 Memo of Law of Deft. Monsanto Co. regarding atty-client communications during Party Depositions. Filed.

12/21 1622 Memo of the Undersigned Defts. in Opposition to Pltfs. Motion to Include 2, 4 in this case. Filed.

12/21 1623 Letter dtd. 12/08/83 from Stephen J. Schlegel of Schlegel & Trafelet, Ltd., to JBW stating that o/b/o the Pltfs. Mgt. Comm. that an Amended Complaint would be filed with the Court on 12/8/83 for a number of reasons. See letter for date.

12/21 1624 Copy of Affidavit of William J. Love, Jr., Esq., re: List of individual w/ Agent Orange Claims. filed.

12/21 1625 Letter dtd. 12/9/83 to JBW from William J. Love, Jr. requesting whether any further action need be taken, filed.

12/21 By Weinstein-Order directing Counsel to send notice to all those mentioned in above docket entry #1624 and for clerk to notify counsel and above atty. See document No. 1625 for order. Filed.

12/21 1626 Letter dtd. 12/09/83 to JBW from Patricia D. Howard, Clk., of MDL Panel regarding transfer of 2 conditional transfer orders by Jud. Panel, filed.

12/21 1627 Stenographer's transcript dtd. 12/19/83 at 1:00p.m., filed.

12/21 1628 United States Memo in Oppositin to Defts. Motion for Reconsideration of the Order Grantg. The U.S. Motion to Dismiss Defts. 3rd party complaints, filed.

12/22 1629 Stenographer's transcript dtd. 12/12/83, filed.

12/22 1630 Order Granting Certain Plaintiffs' Motion for Class Certification, unsigned & dtd. 12/12/83, filed.

12/22 * Before Schreiber, Sp. Mstr. Conf. called. Counsel present (Pltfs.. Defts. & Gov't. Hearing scheduled for Monday 12/19/83 at 9:30 a.m. discussed. Counsel of sides are to present to Sp. Mstr. copies of all previous interrogatories except for those that are three years old or from several weeks ago. Duplicates are not to be submitted. Hearg. Scheduled for Thursday, 12/22/83 at 3:00 p.m. Discussion took place on Authorizations for all Med. & Hosp. Records of Pltfs. in case. Auth. are to be done by express mail only, no first class mail. Issues and problems for preparing a Pre-trial Schedule and Order discussed. On Monday, December 19, 1983 at 9:30 a.m.

Pre-trial Order to ready.

12/22 1631 Stenographer's transcript dtd. 12/12/83 at 1:00 p.m., filed.

12/22 1632 Stenographer's transcript dtd. 12/14/83 at 10:45 a.m., filed.

12/22/ 1633 Memo of Deft. Thompson Chemical Corp. on the Jurisdiction and Venue Implications of transfer Pursuant to 28 USC 1404, filed.

12/22 1634 Letter dtd. 12/15/83 from David J. Dean to JBW regarding compensation of atty (see ltr. for further derails) filed.

12/22 1635 Pltfs. Memo on the Court's Power to Hear and Try on the Merits, all Pltfs.

12/22 1636 By Weinstein-dtd. 12/21/83. Pretrial Order No. 75 that United States of America produce all medical records, sociological and service records of the individuals indicted in the order, filed.

12/22/ 1637 By Weinstein-dtd. 12/21/83. Pretrial Order No. 76 that all physicians and medical personnel and organizations produce all records, etc. (see order specific items) to the attys. listed in the order regarding individuals indicated in order.

12/22 1638 By Weinstein-dtd. 12/321/83. Pretrial Order No. 76 that all physicians and medical personnel and organizations produce all records, etc. (see order specific items) to the attys. listed in the order, regarding individuals indicated in the order.

* * * *

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05/04 2747 Ltr. dtd. 04/30/84 from Russell L. Cook,

Jr., Esq. To B. Heineman c/o/c NP

05/04 2748 Ltr. dtd. 5/3/84 from Keith Snyder, Esq. To JBW with publications attached that reproduced the ":legal notice" ordered via PTO No. 72, etc.

05/04 2749 Ltr. dtd. 04/30/84 to Bob Heineman, c/o/c from Patricia D. Howard, Clerk of MDL Panel regarding statistical accountg., MDL Litigation traffic. NP

05/07 2750 By Weinstein, Ch. J. - Order dtd. 05/07/84-Stipulation of Settlement in re "Agent Orange" Product Liability Litigation, M.D.L. 381. See Stipulation for rulings and details.

05/07 2751 Copy of Ltr. dtd 05/04/84 from Kenneth R. Feinberg, S/M to Arvin Maskin, Esq. Ordered Sealed by Ch. J. Weinstein on 05/05/84.

05/07 2752 MDL 381, in re: Agent Orange, Sealed Record before Ch. J. Weinstein 04/26/84;

05/07 2753 Pltfs. Further Memo in Support of the Produdtion of Defts. Employees and Representatives on Pltfs. Case, 5/1/84.

05/07 2754 Stenographer's transcripts dtd. 4/26/84 at 10:00 a.m. before JBW

05/07 2755 Stenographer's transcripts dtd. 4/27/84 at 6:35 p.m. before Mag. Scheindlin.

05/07 2756 Stenographer's transcripts dtd. 4/26/84 at 12:45 p.m. before Mag. Scheindlin.

05/07 2757 Stenographer's transcripts dtd. 4/25/84 at 10:00 a.m. before Mag. Scheindlin.

05/07 2758 Ltr. dtd. 04/09/84 from Philip D. Pakula to JEW.

05/07 2759 Copy of ltr. dtd. 04/23/84 from Stephen J. Schlegal, Esq. To Keith D. Snyder.

05/08 2760 Ltr. dtd. 05/02/84 from Samuel M. Black to B. Heineman, c/o/c.

05/08	2761	Copy of ltr. dtd. Undtd. From B. Heineman, c/o/c to Samuel M.Black.
05/08	2762	Ltr. dtd. 04/30/84 from Samuel M. Black to B. Heineman, c/o/c.
05/08	2763	Copy of ltr. undtd. From B. Heineman, c/o/c to Samuel M. Black.
05/08	2764	Ltr. dtd. 04/27/84 from Jack Mordente of the state of Conn. To B. Heineman.
05/08	2765	Copy of ltr. dtd. 05/07/84 from B. Heineman, c/o/c to Jack Mordente.
05/08	2766	Copy of ltr. dtd. 05/07/84 from B. Heineman, c/o/c to Andres E. Mendez.
05/08	2767	Ltr. dtd. 04/27/84 from Andres E. Mendez of Calif. Dept. of Vets. Affairs to B. Heineman, c/o/c.
05/08	2768	Affidavit of Dorothy Thompson of Los Angeles, Calif., dtd. 05/04/84.
05/08	2769	Telephone call certif.. dtd.05/04/84.
05/08	2770	Listg. Of mail which has been returned as undelivered or undeliverable, 5/4/84.
05/08	2771	Certif. of service of mail deposited in post office, 5/4/84.
05/08	2772	Cert. with respect of mail received, 5/4/84.
05/08	2773	Listg. of mail which has been returned as undelivered or undeliverable, 5/7/84.
05/08	2774	Telephone call certification, 5/7/84.
05/08	2775	Certif. with respect to mail received, 5/7/84.
05/08	2776	Certif. of service of mail deposited in post office, 5/7/84.
05/08	2777	Telegram dtd. 5/7/84 to JBW from Robert T. Finley, disable Vet.
05/08	2778	Telegram dtd. 5/7/84 to JBW from John A. and Judith R. Hanson, regarding settlement.
05/08	2779	Affidavit of William T. Jorden, Esq., of Pennsylvania, dtd. 5/3/84.

05/08	2780	Ltr. dtd. 5/1/84 from Michael F. Aiken, aVV Vet to JBW.
05/08	2781	Ltr. dtd. 04/27/84 from Andres E.Mendez of Calif. To B. Heineman, c/o/c with list of names attached regarding class not.
05/09	2782	File received from USDC Central District of California for line case CV 84-1200 Rosalie Kane.
		* * * *
		[Page 148]
1984 05/29	2879	Memo of Deft. Hooker Chemicals & Plastics Corp. in Support of Its Motion for a Judgment Order in Lester v. Hooker Chemicas & Plastics Corp., filed
05/29	2880	U.S.' Motion For a Stay of all Proceedings as to the U.S. Pending Disposition of its Appeal of Pretrial Order 91 in the Court of Appeals. dtd. 05/23/84. See document no. 2876 for JBW's order regardg. this matter. Memo of Law attached to Motion.
05/29	2881	U.S. of America's Memorandum of Law in Opposition to Diamond Shamrock Corp.'s Motion for Reconsideration of Potential Govt. Liability, dtd. 5/28/84. NP
05/29	2882	Response of the Dow Chemical Co. in Opposition to Pltfs. Motion for Removal Pursuant to 28 USC Sec. 1407. (Paul W. Lester v. The Dow Chem. Co., et al-CV 80-1992). NP
05/29	2883	Memo of Law of the Dow Chemical Co. in Opposition to Pltfs. Motion for Removal Pursuant to 28 USC Sec. 1407. NP
05/29	2884	By Weinstein, Ch. J.-OSC returnable on May 29, 1984 at 2:00 p.m. as to why an order should not be entered dismissing with prejudice all claims asserted in these

proceedings with respect to Agent White, se order for specifics. NP

05/29 2885 Motion for Public Hearings Prior to Acting on Approval of the Proposed Settlement in the Above Captioned Matter (Agent Orange MDL 381). NP

05/29 --- Before Weinstein, Ch. J.- Case called on 05/29/84 at 2 p.m. Counsel for all sides present, listed above. Order submitted by Deft. Dow Chem Co. signed with respect to Agent White and the court's disjissal with prejudice of all claims asserted in these proceedings. NP

05/28 2886 Copy of On Appeal from the USDC for the Eastern District of New York, Brief for the U.S., in the US Court of Appeals for the 2nd Circuit, Michael F. Ryan, et al -v- Dow Chemical Co., et al. Defts., Third-Party Pltfs., Appelles, dtd. 5/22/84. NP

05/29 2887 Appendix to above matter on appeal to Court of Appeals, 2nd Circuit. NP

05/29 2888 Ltr. dtd. 05/14/84 from H. David Blair, Esq. To B. Heineman, c/o/c. ack./m. NP

05/29 2889 Ltr. dtd. 5/14/84 from William S. Calli, Esq. To B. Heineman, c/o/c ack/m. NP

05/30 2890 By Weinstein, Ch. J.-Order dtd. 5/29/84 that all claims asserted in proceedings with respecdt to Agent White are hereby dismissed with prejudice. NP

05/30 2891 Ltr. dtd. 05/21/84 from John C. Sabetta, Esq., to JBW regarding Agent White, Dow Chemical Co. and settlement agreement. See ltr. for details. NP

05/30 2892 Two file folders of individual ltrs. from veterans regardg. A.O. litigation with copy of ltr. sent by JBW's chambers

acknowledging receipt of each ltr. attached. 05/29/84 NP

05/30 2893 File folder of individual ltrs. from vets regardg. A.O. litigation with copy of ltr. sent by JBW's chambers acknowledging receipt of each ltr. attached. NP

05/30 2894 Stenographer's transcripts dtd. 05/29/84 at 2:00 p.m. before JBW. NP

05/30 2895 Response of Agent Orange Pltfs. Management Committee to Waga & Spinelli's intervening motion. NP

06/11 2896 Plaintiffs' Motion for Approval of Settlement and for entry of an order concerning Notice and Hearing with respect thereto, dtd. 6/11/84. CV 79-747. NP

06/11 2897 Settlement Agreement, dtd. 6/11/84. CV 79-747 NP

06/11 2898 By Weinstein Ch. J. - Order dtd. 6/11/85 Order concerning notice to class members, and hearing on proposed settlement. See order for details. CV 79-747. NP

06/11 2899 Notice of proposed settlement of class action, 79 C 747, 06/11/84. NP

06/11 2900 Notice of propsed settlement of class action, 79 C 747, 06/11/84.

06/11 2901 Special notice to persons who have filed exclusion request forms in the Agent Orange litigation, 06/11/84. 79 C 747 NP

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Continuation: Any claims must be filed with the court which will pass on the claims. Use the forms approved by the Magistrate. Mr. Shimek, Jr. so notified. NP

8/12 3556 Copy filed 07/02/84 from U.S. Crt. Of

Appeals Second Circuit of ORDER that the stay previously granted by a panel of this court be and it hereby is continued to and including the determination of appeal. Order dtd. 6/22/84. NP

8/12 3557 Copy of Order from U.S. Crt. of Appeals 2nd Circuit dtd. 06/14/84 and filed 07/02/84 with clk., that Petition by U.S.A. for rehearing in 84-3021 is denied. See order for details. NP

8/12 3558 Copy of Notice of Motion for Expedited Ruling on Petition for Rehearing (& en banc suggestion) (see doc. # 3557) dated 6/14/84 from U.S. Crt. Of Appeals C of A Order states: Motion for stay considered to be moot. NP

8/12 3559 Copy of Notice of Motion for Leave to File an Oversized Memorandum, from U.S. Crt. Of Appeals 2nd Circuit - 84-3021 84-8034 (Crt. Of Appeals #'s). NP

8/12 File received from USDC Eastern District of Pennsylvania Case docket No. CV 84-2526; Cynthia McCarthy, et al. -v- Dow Chem. Co., et al. Ack./mld. NP

0812 File received from USDC Southern District of Mississippi on 7/19/84. This office did not receive order from MDL Panel authorizing transfer until 07/18/84.

8/13 3560 Ltr. dtd. 07/18/84 from Judith L. Spanier, Esq., to JBW. SEALED NP

8/13 3561 By Weinstein, Ch. J. - Admnistrative Order No. 5 - authorization for Clerk of the Court to pay Special Masters Kenneth R. Feinberg, Esq., Leonard Garment, Esq. And David I. Shapiro. NP

8/13 3562 By Weinstein, Ch. J. - Administrative Order No. 6 - Re: March of Dimes

proposal dtd. 07/25/84 and JBW's Order dtd. 08/02/84 concerning development of a plan for the evaluation of claims. JBW authorizes the March of Dimes to develop plans and submit vouchers which are to be approved in advance of payment. See order for specifics. NP

8/13 3563 Ltr. dtd. 08/09/84 from Kenneth R. Feinberg, Esq. to JBW regarding request for payment of services rendered. See ltr for specifics. NP

8/13 3564 Agent Orange Litigation Settlement Questionnaire which was returnable to: Greenwald and Thompson, P.C. of Los Angeles, Ca., was filed with this office by a Vietnam Veteran (Name unreadable) from Springfield, Mass. NP

08/13 3565 Stenographer's transcripts dtd. 08/08/84 before JBW at 10:00 a.m. NP

08/13 3566 Stenographer's transcripts dtd. 08/09/84 before JBW at 10:00 a.m. NP

08/13 3567 Stenographer's transcripts dtd. 08/10/84 before JBW at 10:00 a.m. NP

U.S. District Court
New York Eastern (Brooklyn)
CIVIL DOCKET FOR CASE #: 98-CV-6383
Isaacson, et al v. Dow Chemical Co., et al

Filed: 10/20/98
Assigned to: Judge Jack B. Weinstein
Demand: $0,000
Nature of Suit: 890
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in Dist. of NJ : is 3:98-3988
Cause: 28:1331 Fed. Question: Tort Action

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
10/20/98	1	LETTER dated September 28,1998 from Judicial Panel On Multidistrict Litigation to Judge Weinstein with Conditional Transfer Order attached (fxc) [Entry date 10/26/98]
2/18/99	2	Certified Conditional transfer order filed. Request for file mailed. (rj) [Entry date 02/18/99]
3/4/99	3	NOTICE of voluntary dismissal dtd. 2/19/99 By JBW dtd. 3/2/99 Close the case (rj) [Entry date 03/04/99]
3/10/99	4	LETTER dated 2/26/99 from Mark R Cuker to JBW enclosed voluntry dismissal. (rj) [Entry date 03/10/99]
3/18/99	5	LETTER dated Feb. 26, 1999, from U.S.D.C., Dist. of New Jersey, sending us their file. Their case number is Civil-98-3988 (AET). (tv) [Entry date 03/18/99]

7/8/99	6	Calendar entry:,Before Judge Weinstein Civil Cause for status conf. Ct Rep. Dom Tursi For pltff. Ron Simon Stephen Murray For deft. Stephen Brock et al.Case called. Counsel for all sides pres. Motions to be filed and fully briefed by 9/27/99. set motion conference for 9:30 10/7/99 before Judge Jack B. Weinstein (rj)[Entry date 07/13/99]
9/22/99	7	ORDER APPROVEDOn ltr. dtd. 9/10/99 from Steven Brock motion fopr 12/13/99 @ 10:00 (signed by Judge Jack B. Weinstein , on 9/13/99) (rj) [Entry date 09/22/99]
10/18/99	8	MOTION by Dow Chemical Co., Monsanto Co., Hercules Inc., Occidental Chemical, Ultramar Diamond Sha, Maxus Energy Corp., Chemical Land Holdin, T-H Agriculture & Nu, Thompson Hayward, Harcros Chemical, Uniroyal, Inc., C.D.U. Holding Inc., Uniroyal Chemical to dismiss, Motion hearing set for 10:00 12/13/99 [8-1] motion (rj) [Entry date 10/18/99]
10/18/99	9	MEMORANDUM by Dow Chemical Co., Monsanto Co., Hercules Inc., Occidental Chemical, Ultramar Diamond Sha, Maxus Energy Corp., Chemical Land Holdin, T-H Agriculture & Nu, Thompson Hayward, Harcros Chemical, Uniroyal, Inc., C.D.U. Holding Inc., Uniroyal Chemical in support of [8-1] motion to dismiss (rj) [Entry date 10/18/99]
10/18/99	10	AFFIDAVIT of STEVEN BROCK by Dow Chemical Co. Re:in support [8-1]

		motion to dismiss (rj) [Entry date 10/18/99]
11/16/99	--	RESPONSE by Phyllis Lisa Isaacson in opposition to [8-1] motion to dismiss (see 99 3056 # 6) (rj) [Entry date 11/16/99]
12/3/99	11	AFFIDAVIT of LAURA WELCH (rj) [Entry date 12/03/99]
12/3/99	12	RESPONSE by Phyllis Lisa Isaacson in opposition to [8-1] motion to dismiss (rj) [Entry date 12/03/99]
12/13/99	15	Calendar entry:Before Judge Weinstein Civil Cause for motion conf. on motion to dismiss. granting [8-1] motion to dismiss Court Reporter/ESR Burt Suizer Case called. Counsel for all sides pres.Motion argued. Order to be submitted by parties. (rj) [Entry date 12/16/99]
12/14/99	13	REPLY MEMORANDUM OF LAW by Dow Chemical Co. in further support [8-1] motion to dismiss (rj) [Entry date 12/14/99]
12/15/99	14	LETTER dated 12/9/99 from Philip D.Nykamp to Clerk of the Court copy of deft's reply memo. (rj) [Entry date 12/15/99]
2/17/00	16	ORDER, For the reasons stated orally on the record dismissing (signed by Judge Jack B. Weinstein , on 2/14/00) Copies mailed (rj) [Entry date 02/17/00]
2/17/00	--	Case closed (rj) [Entry date 02/17/00]
3/10/00	17	NOTICE OF APPEAL by Phyllis Lisa Isaacson, Joe Isaacson Pltffs/Appellants. Fee Paid $ 105.00 Receipt # 229631 [16-1] order dismissing. NOA served by the Clerk. Judge notified. C of A notified. (mcg) [Entry date 03/17/00]

3/17/00	--	Certified copy of docket sheet sent to USCA. [17-1] appeal (mcg) [Entry date 03/17/00]
4/13/00	18	ORDER & JUDGMENT The court heard argument on deft's motion to dismiss in the above action on 12/13/99. A copy of transcript of proceedings is attached. Upon consideration of that argument and all proceedings, motions, proceedings, and the full record in MDL 381 and in the above captioned actions, Deft's motion to dismiss is Granted. The complaints and any and all amendments shall be dismissed as against all deft's with prejudice, and without costs assessed to any party. (signed by Judge Jack B. Weinstein on 4/7/2000), (rj) [Entry date 04/13/00]
5/2/00	19	USCA Scheduling order: [17-1] appeal Appeal record due by 6/1/00 . USCA Number: 00-7311Appellant's brief due 6/8/00. Appellee's brief due 7.10.00. Argument set for 8/21/00. (lizv) [Entry date 05/10/00]
6/26/00	20	MANDATE OF USCA (certified copy) Re: [17-1] appeal. Stipulation withdrawing premature appeal. This stipulation shall not preclude any appeal from a final judgment. Certified: 6/20/00. Judge Notified. Ackn. mailed. USCA# 00-7311. (lizv) [Entry date 06/27/00]
8/23/00	21	MOTION by Joe Isaacson, Phyllis Lisa Isaacson for an order pursuant to Rule 54 (b), Motion hearing [21-1] motion motion file stamped: 8/23/2000 and mailed/served: 8/9/2000 (rj) [Entry date 08/23/00]

8/23/00	22	ORDER Final Judgment in favor of deft's. (signed by Judge Jack B. Weinstein ,on 8/16/2000) (rj) [Entry date 08/23/00]
8/25/00	23	NOTICE OF APPEAL by Phyllis Lisa Isaacson, Joe Isaacson Fee Paid $ 105.00 Receipt # 236196 [22-1] order. Affidavit of service attached. (mm) [Entry date 08/30/00]
8/30/00	--	Certified copy of docket sheet sent to USCA. [23-1] appeal (mm) [Entry date 08/30/00]
12/1/00	24	USCA Scheduling order: [23-1] appeal Appeal record due by 12/15/00 . USCA Number: 00-9120 Appellant's brief due 1/22/00. Appellee's brief due 1/22/01. Argument set for 3/5/01. (mcg) [Entry date 12/04/00]
5/6/02	25	Briefs and Petition for Rehearing and Rehearing En Banc filed in the Court of Appeals. (Regarding Civil Cases: 98-6383; 99-3056; Document #25 in 98-6383) (tl) [Entry date 05/07/02]
5/31/02	--	NOTICE: this matter will be placed on the court's calendar for status conference on 6.20.02 @ 11:00 a.m. (Signed by June Lowe, Case Manager, on 5.28.02). C/M-Ch SEE: civil case no. 98-cv-3056 doc. # 18, for further details. (cnb) [Entry date 05/31/02]
6/20/02	26	Calendar entry: Case called before Hon. Jack B. Weinstein on date of 06/20/02 for Status Conference. Counsel for both sides present. Conference held. Court Reporter/ESR M. Diamond (sl) [Entry date 07/02/02]

7/17/02	--	TRANSCRIPT of proceedings before USDJ Weinstein filed for date of 6.20.02; Counsel for all sides present. C/R: Frederick R. Guerino, C.S.R. SEE: Civil case no. 99-cv-3056, doc. # 20, for further details. (cnb) [Entry date 07/17/021
9/16/02	27	ORDER: motions to dismiss, for summary judgment and any other motions shall be made returnable on 10/25/2002. These old cases shall be promptly disposed of. (Signed by Judge Jack B. Weinstein, on 9/12/2002). C/M-CH (Also docketed in case no. 99-cv-3056). (cnb) [Entry date 09/17/02]
9/27/02	28	ORDER: the parties are directed to file motions for summary judgment or any other appropriate relief no later than 30 days after the completion of appellate procedure. (Signed by Judge Jack B. Weinstein, on 9/27/2002). C/M-CH (cnb) [Entry date 09/30/02]
10/1/02	--	In the Supreme Court of the U.S. In re: Agent Orange Product Liability Litigation: Dow Chemical Co., Monsanto Co., et. al. v. Daniel Raymond Stephenson et. al., On Petition for a Writ of Certiorari to the U.S.C.A. for the Second Circuit. *Originally docketed in case no. 99-cv-3056, doc. no. 22. (cnb) [Entry date 10/01/02]
10/8/02	29	MAIL RETURNED: Order, dated 9/27/2002, was returned on 10/08/2002. Addressed to: Mark Cuker, Esq., Williams & Cuker, Woodland Falls Corporate Park, 200 Lake Drive East Ste

		100. Cherry Hill, N.J. 08002. Returned w/notations: "RTS-not at this address." *Forwarded to June Lowe. (cnb) [Entry date 10/08/02]
10/24/02	--	LETTER dated 10/07/2002 from Mark R. Cuker to USDJ Weinstein advising that no motions will be filed or considered while a Petition for Certioriari w/the U.S Supreme Court is pending. Also, requesting that he be served w/all notices issued by the Court. [Address updated] SEE: case no. 99-cv-3056, doc. no. 25, for further details. (cnb) [Entry date 10/24/02]

U.S. District Court
New York Eastern (Brooklyn)
CIVIL DOCKET FOR CASE #: 99-CV-3056
Stephenson, et al v. Dow Chemical, et al

Filed: 06/01/99
Assigned to: Judge Jack B. Weinstein
Referred to: Magistrate John L. Caden
Demand: $0,000
Nature of Suit: 365
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in W.D. Louisiana : is 6:99-296
Cause: 28:1332 Diversity-Personal Injury

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
7/8/99	1	LETTER dated 4/28/99 from Michael J Beck to Mr Heinemann enclosed conditional transfer order filed in the panel on 4/12/99. (rj) [Entry date 07/08/99]
7/8/99	2	CONDITIONAL TRANSFER ORDER dtd. 4/28/99. Filed with request for file attached. (rj) [Entry date 07/08/99]
8/3/99	3	Entire Record recd from WD of Louisiana. (rj) [Entry date 08/03/99]
8/25/99	4	LETTER dated 7/6/99 from Steven Brock to June Lowe enclosed copy of conditional transfer order. (rj) [Entry date 08/25/99]
9/22/99	5	ORDER APPROVED On ltr. dtd. 9/10/99 from Steven Brock Motion hearing to dismiss on 12/13/99 @ 10:00. (signed by Judge Jack B. Weinstein , on 9/13/99) (rj) [Entry date 09/22/99]
10/18/99	--	MOTION by Dow Chemical, Monsanto

		Co., Hercules Inc., Occidental Chemical, Ultramar Diamond, Maxus Energy Corp., Chemical Land Holdin, T-H Agriculture & Nu, Thompson Hayward, Harcros Chemical Inc, Uniroyal, Inc., C.D.U.Holding, Inc., Uniroyal Chemical to dismiss, Motion hearing set for 10:00 12/13/99 [0-1] motion see document # 8 CV 98 6383 (rj) [Entry date 10/18/99]
10/18/99	--	MEMORANDUM by Dow Chemical, Monsanto Co., Hercules Inc., Occidental Chemical, Ultramar Diamond, Maxus Energy Corp., Chemical Land Holdin, T-H Agriculture & Nu, Thompson Hayward, Harcros Chemical Inc, Uniroyal, Inc., .D.U.Holding, Inc., Uniroyal Chemical in support of [0-1] motion to dismiss see document # 9 CV 98 6383 (rj) [Entry date 10/18/99]
10/18/99	--	AFFIDAVIT of STEVEN BROCK by Dow Chemical Re:in support [0-1] motion to dismiss see document # 10 CV 98 6383 (rj) [Entry date 10/18/99]
11/16/99	6	RESPONSE by Daniel Raymond Stephenson in opposition to [0-1] motion to dismiss (rj) [Entry date 11/16/99]
12/13/99	7	Calendar entry: Before Judge Weinstein Civil Cause for motion hearing Case called. Counsel for all sides pres. Motion argued. granting [0-1] motion to dismiss Court Reporter/ESR Burt Sulzer order to be submitted by parties. (rj) [Entry date 12/16/99]
2/18/00	8	ORDER, that for the reasons stated orally on the record, this case is dismissed. (Signed by Judge Jack B. Weinstein on 2/14/00) c/m (tj) [Entry date 02/18/001

2/18/00	--	Case closed (tj) [Entry date 02/18/00]
4/3/00	9	ORDER & JUDGMENT Deft's motion to dismiss is GRANTED. Complaint and any and all amendments shall be dismissed as against all deft's with prejudice and without costs assessed to any party. (signed by Judge Jack B. Weinstein, on 3/27/00), (rj) [Entry date 04/03/00]
4/7/00	10	NOTICE OF APPEAL by attorney for Daniel Raymond Stephenson Fee Paid $ 105.00 Receipt # 230770 [9-1] judgment order, [8-1] order dismissed. Certificate of service attached. (mm) [Entry date 04/12/00]
4/12/00	--	Certified copy of docket sheet sent to USCA. [10-1] appeal (mm) [Entry date 04/12/00]
4/13/00	11	ORDER & JUDGMENT The court heard argument on deft's motion to dismiss in the above-captioned actions on 12/13/1999. A copy of transcript of proceedings is attached hereto. Upon consideration of that argument and all pleadings, motions, proceedings, and the full record in MDL 381 and in the above-captioned actions. Deft's motion to dismiss is Granted. (signed by Judge Jack B. Weinstein , on 4/7/2000), (rj) [Entry date 04/13/00]
5/8/00	12	AMENDED NOTICE OF APPEAL by Daniel Raymond Stephenson, Susan Stephenson, Daniel Anthony Stephenson, Emily Elizabeth Stephenson [11-1] judgment order. These parties appeal to correct the caption of their case. Service made by Clerk. (mm) [Entry date 05/15/00]
5/15/00	--	Certified copy of docket sheet sent to USCA. [12-1] appeal (mm) [Entry date

05/15/00]

5/25/00 13 USCA Scheduling Order: [12-1] appeal Appeal record due by 6/19/00 . USCA Number: 00-7455 Appellant's brief due 6/21/00. Appellee's brief due 7/21/00. Argument set for 9/5/00. (mcg) [Entry date 05/25/00]

6/9/00 14 LETTER dated 11/12/99 from Stephen B. Murray, Jr., to Clerk of Court enclosing plaintiff's opposition papers. (tj) [Entry date 06/09/00]

8/18/00 -- Certified and transmitted (INDEX) record on appeal to U.S. Court of Appeals: [12-1] appeal, [10-1] appeal . Acknowledgment requested. (mcg) [Entry date 08/18/00]

8/29/00 15 Acknowledgment from USCA received for the (INDEX) re: [12-1] appeal, [10-1] appeal. Signed by TT. (mcg) [Entry date 08/29/00]

6/1/01 -- Certified and transmitted record on appeal to U.S. Court of Appeals: [12-1] appeal, [10-1] appeal . Acknowledgment requested. PLEASE NOTE: THIS RECORD IS BEING SENT TO VINCENZA SINGELTON AS PER HER REQUEST.IT CONTAINS THE FOLLOWING DOCUMENTS #'S 1-14. (mcg) [Entry date 06/01/01]

12/11/01 16 COPY OF OPINION sent from Chambers to be docketed (certified copy) Re: [12-1] appeal, [10-1] appeal. "...we hold that the prior Agent Orange settlement does not preclude these Plaintiffs from asserting their claims alleging injury due to Agent Orange exposure. Because these Plaintiffs were inadequately represented in the prior litigation, based on the Supreme Court's

teaching in Amchem and Ortiz, they were not proper parties to the litigation. We therefore vacate the District Court's dismissal and remand the case to the District Court for further proceedings consistant with this opinion. Please note: this document returned to Chambers. (mm) [Entry date 01/08/02]

4/26/02 17 NOTICE, that the above entitled matter will be placed on the court's calendar for status conference on 5.15.02 @ 9:30 a.m. (Signed by June Lowe, Case Manager, on 4.25.02). (cnb) [Entry date 04/26/02]

5/6/02 -- Briefs and Petition for Rehearing and Rehearing En Banc filed in the Court of Appeals. (Regarding Civil Cases: 98-6383; 99-3056; Document #25 in 98-6383) (tl) [Entry date 05/07/02]

5/31/02 18 NOTICE: this matter will be placed on the court's calendar for status conference on 6.20.02 @ 11:00 a.m. (Signed by June Lowe, Case Manager, on 5.28.02). C/M-Cj (cnb) [Entry date 05/31/02]

6/20/02 19 Calendar entry: Case called before Hon. Jack B. Weinstein on date of 06/20/02 for Status Conference. Counsel for both sides present. Conference held. Court Reporter/ESR M. Diamond (sl) [Entry date 07/02/02]

7/17/02 20 TRANSCRIPT of proceedings before USDJ Weinstein filed for date of 6.20.02; Counsel for all sides present. C/R: Frederick R. Guerino, C.S.R (cnb) [Entry date 07/17/021 [Edit date 07/17/02]

9/16/02 23 ORDER: motions to dismiss, for summary judgment and any other motions shall be made returnable on 10/25/2002. These old

cases shall be promptly disposed of. (Signed by Judge Jack B. Weinstein, on 9/12/2002). C/M-CH (Also docketed in case no. 98-cv-6383). (cnb) [Entry date 09/17/02]

10/4/02 24 LETTER dated 9/19/2002 from Esteban Arevalo, Jr. to USDJ Weinstein requesting a copy of "the complaint that Stephenson v. Dow Chemical filed in this court." (cnb) [Entry date 10/04/02]

9/27/02 -- ORDER: the parties are directed to file motions for summary judgment or any other appropriate relief no later than 30 days after the completion of appellate procedure. (Signed by Judge Jack B. Weinstein, on 9/27/2002). C/M-CH *Originally docketed in case no. 98-cv-6383, doc. no. 28. (cnb) [Entry date 09/30/02]

10/1/02 22 In the Supreme Court of the U.S. In re: Agent Orange Product Liability Litigation: Dow Chemical Co., Monsanto Co., et. al. v. Daniel Raymond Stephenson et. al., On Petition for a Writ of Certiorari to the U.S.C.A. for the Second Circuit. (Also docketed in 98-cv-6383). (cnb) [Entry date 10/01/02]

10/4/02 24 LETTER dated 10/03/2002 from Robert C. Heinemann to Mr. Arevalo enclosing a copy of the petition for certiorari, filed on 10/01/2002, & a copy of the docket sheet. (w/o encl.) (cnb) [Entry date 10/04/02]

10/8/02 -- MAIL RETURNED: Order, dated 9/27/2002, was returned on 10/08/2002. Addressed to: Mark Cuker, Esq., Williams & Cuker, Woodland Falls Corporate Park, 200 Lake Drive East Ste 100. Cherry Hill, N.J. 08002. Returned w/notations: "RTS-not at this address." *SEE: case no. 98-cv-6383,

doc. no. 29, for further details. (cnb) [Entry date 10/08/02]

10/22/02 25 LETTER dated 10/07/2002 from Mark R. Cuker to USDJ Weinstein advising that no motions will be filed or considered while a Petition for Certioriari w/the U.S Supreme Court is pending. Also, requesting that he be served w/all notices issued by the Court. [Address updated] (cnb) [Entry date 10/24/02]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

THIRD AMENDED VERIFIED COMPLAINT

This master paper submitted by

Victor John Yannacone, Jr.

YANNACONE & YANNACONE
Professional Corporation
Plaintiffs' Attorneys
Office & P. O. Address
Post Office Drawer #109
Patchogue, New York 11772
(area code 516) 654-2299

79-10-15

THIRD AMENDED VERIFIED COMPLAINT
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THIRD
AMENDED VERIFIED COMPLAINT

PLAINTIFFS DEMAND TRIAL BY JURY

In the matter of the claims for equitable relief and damages brought by veterans of the War in Southeast Asia who are still alive; wives of those veterans who are still alive; veterans now deceased; widows of veterans now deceased; parents of veterans now deceased; and children of those veterans; jointly and severally, against THE DOW CHEMICAL COMPANY, HERCULES INCORPORATED, DIAMOND SHAMROCK CORPORATION, MONSANTO CO., and THOMPSON-HAYWARD CHEMICAL COMPANY, the plaintiffs allege the following by their attorneys:

Venue

1. The venue of this action has been determined under the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

General Jurisdiction

2. Jurisdiction of this Court is invoked under Title 28 United States Code §1331 and the amount in controversy herein exceeds the sum or value of $10,000 exclusive of interest and costs, and this cause of action arises under the Constitution, laws or treaties of the United States, as more fully and at length hereinafter set forth and alleged.

3. Upon information and belief, the "corporate defendants" have violated the common law and/or the statutory laws of the United States of America and while engaged in interstate commerce, laws of the several states, in manufacturing and marketing phenoxy herbicides such as the 2,4,5-trichloro-phenoxy aliphatics contaminated with the toxic synthetic organic chemical 2,3,7,8-tetrachloro dibenzo o-dioxin (TCDD or "Dioxin") since such contaminated herbicides were. and still are, inherently dangerous and unsafe for use.

4. Among the statutes from which a cause of action can be implied are:

(a) Federal Insecticide, Fungicide and Rodenticide Act (FIFRA):

(b) The Federal Environmental Pesticide Control Act

(c) The Toxic Substances Control Act (TOSCA);

(d) The Consumer Product Safety Act (CPSA).

Equitable Jurisdiction

5. This action is brought in equity before this court on certain grounds, among them:

6. The subject matter of this action is essentially equitable in nature.

7. This action is brought for the purpose of restraining the "corporate defendants" from doing further serious, permanent and irreparable injury to the individual plaintiffs and the class of plaintiffs and in order to provide adequate compensation and related affirmative relief for damages

already inflicted, and to dissipate the effects of the defendants wrongful conduct as alleged herein.

8. The declaratory judgment and injunctive relief demanded on behalf of the class are equitable remedies and the substantive character of the rights sought to be enforced by the Plaintiff are historically resolved in a court of equity.

9. Upon a finding that the "corporate defendants" are liable for damages to the plaintiffs, this action is brought to create a trust fund out of the current earnings of the defendants in the nature of a reserve against the claims of all the individual members of the plaintiff class to insure that the compensation of any group of individual plaintiffs will not impair the rights of those not before the Court at that time.

10. There is no plain, adequate and complete remedy at law as practical and efficient as the equitable relief sought herein, since the damages sustained by the individuals and the class on whose behalf this action is brought requires equitable relief in the form of a permanent injunction prohibiting defendants from manufacture distribution and sale of contaminated herbicides so as to prevent further injury by means of continued exposure to those plaintiffs already injured as well as the compelling need to diminish the risk of injury to those already at risk as a result of their prior exposure.

Class Action Allegations

11. Plaintiffs assert this action is maintainable as a "class action" under the provisions of Rule 23(b)(1)(A), Rule 23(b)(1)(B). Rule 23(b)(2), and Rule 23(b)(3).

12. Upon information and belief, that during the period from 1962 through 1971, approximately 2.4 million American servicemen were exposed to contaminated herbicides manufactured and marketed by the "corporate defendants" for use in Southeast Asia.

13. Upon information and belief, many servicemen, now veterans, have manifested symptoms of such exposure.

14. Upon information and belief, it is therefore reasonable to expect numerous additional claims will be made in the future by individuals so unfortunate as to be similarly afflicted, and it will be necessary for this Court to retain jurisdiction over the class in order to assure equitable distribution of the assets of the "corporate defendants" in satisfaction of all the judgments which may be entered against them.

15. Upon information and belief, the combined liquid assets of the "corporate defendants" will be insufficient to fully compensate the entire class of plaintiffs.

16. The claims of the plaintiffs are representative of the claims of all the members of the class as a result of the toxic effects of contaminated herbicides.

17. There are fifteen groups of plaintiffs which may *be* identified within the entire class of plaintiff veterans and their families and treated as subclasses under Rule 23:

(a) Plaintiff Class 1. Veterans with symptoms;

(b) Plaintiff Class 2. Veterans with symptoms and evidence of genetic damage;

(c) Plaintiff Class 3. Living Veterans without symptoms but with evidence of genetic damage;

(d) Plaintiff Class 4. Living Veterans without symptoms but at risk of genetic and somatic damage;

(e) Plaintiff Class 5. Deceased Veterans;

(f) Plaintiff Class 6. Wives of Veterans claiming loss of society, comfort, companionship, services, and support;

(g) Plaintiff Class 7. Wives of Veterans claiming loss of consortium;

(h) Plaintiff Class 8. Widows of Veterans.

(i) Plaintiff 9. Parents of Deceased Veterans;

(j) Plaintiff Class 10. Veterans and their wives as parents;

(k) Plaintiff Class 11. Veterans and their wives as parents of children who were stillborn or died while still infants;

(l) Plaintiff Class 12. Veterans and their wives as parents of children lost through miscarriage and spontaneous abortion;

(m) Plaintiff Class 13. Veterans' children at risk of genetic damage;

(n) Plaintiff Class 14. Veterans' children afflicted with genetic and somatic damage;

(o) Plaintiff Class 15. Veterans' children claiming loss of parental guidance and support.

A list of the names and addresses of each said plaintiff claimed to be an identified member of each said class is annexed hereto and made a part of this Complaint.

18. It is possible to establish criteria for identification of each individual class member by reference to records maintained in the regular course of governmental operations by various agencies of the United States of America, in particular, the Department of Defense, the Veterans Administration and the Department of Health, Education and Welfare.

19. Members of the class are fairly and adequately represented by counsel for the plaintiffs and neither the individual plaintiffs named at this time nor the attorneys for said plaintiffs so named have any interests adverse to those of any individual members of the class of all those who might be entitled to the relief sought herein.

20. There are substantial questions of law and fact common to the class.

21. The questions of law common to the class of all those who have already been affected, or are now or will be subject to the toxic effects of products manufactured and marketed by the "corporate defendants" herein, although

known to be contaminated with toxic synthetic organic chemicals include, but are not limited to:

(a) the joint and several liability of defendants;

(b) the nature and extent of the legal and fiduciary obligations of defendants, by reason of their economic power and technological resources owed plaintiffs and all others during this generation and succeeding generations;

(c) the remedy to be fashioned by the Court to redress the wrongs committed by defendants upon the plaintiffs, and all others similarly afflicted, or at risk of such affictions; and

(d) the appropriate measure of damages.

22. The questions of fact common to the class of all those who have already been affected, or are now or will be subject to the toxic effects of products manufactured and marketed, individually and collectively, by the "corporate defendants" herein although known to be contaminated with toxic synthetic organic chemicals include, but are not limited to:

(a) the extent of the toxic effects attributable to such products that were contaminated with polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs);

(b) the characteristics of such toxic effects manifested in human beings;

(c) the permanence of such toxic effects; and

(d) the extension of toxic effects through genetic and somatic damage to succeeding generations.

AS AND FOR A
FIRST CAUSE OF ACTION
PLAINTIFFS ALLEGE:
STRICT PRODUCT LIABILITY

23. That all the plaintiff veterans (Plaintiff Class 1, Plaintiff Class 2, Plaintiff Class 3, Plaintiff Class 4, Plaintiff Class 5, Plaintiff Class 10, Plaintiff Class 11, and Plaintiff Class 12) were members of the armed forces of the United

States and were exposed in Southeast Asia to herbicides contaminated as alleged herein.

24. That each plaintiff and each member of the plaintiff of class, has suffered injury, has been damaged, and some of said plaintiffs have already died, as a result of a number of ills and maladies, including malignant conditions, resulting from, aggravated by, or in some other way attributable to exposure to the contaminated herbicides as aforesaid.

25. Upon information and belief, that at least since 1962, and continuing to date, each of the "corporate defendants" THE DOW CHEMICAL COMPANY, HERCULES INCORPORATED, DIAMOND SHAMROCK CORPORATION, MONSANTO CO., and THOMPSON-HAYWARD CHEMICAL COMPANY (herein referred to as the "corporate defendants") manufactured and marketed. phenoxy herbicides such as the 2,4,5-trichlorophenoxy aliphatics for use in Southeast Asia, the United States, and throughout the rest of the world.

26. Upon information and belief, that at all the times herein mentioned, the aforementioned phenoxy herbicides were and still are contaminated with toxic synthetic organic chemicals such as polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs), and by reason of such contamination, defective.

27. Upon information and belief, that at all the times herein mentioned, the "corporate defendants" knew that the aforementioned phenoxy herbicides contaminated with toxic synthetic organic chemicals such as polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs) were inherently dangerous.

28. That the ""corporate defendants", by reason of their economic power, technological resources, and proprietary knowledge are, and have been, trustees of the public health, safety, and welfare and the health, safety and welfare of the Plaintiffs and all those others similarly situated and exposed to contaminated herbicides which they manufactured and

marketed, knew or should have known about the contamination of their products and that such contamination could cause human injury.

29. To the extent that the "corporate defendants" knew, or with the exercise of reasonable care and concern for the public health, safety and welfare should have, with reasonable diligence, known, that the herbicides they manufactured and marketed, were contaminated which could cause human injury said "corporate defendants" were under a non-delegable duty to do whatever was necessary and within their economic power and technologic resources to protect the public health, safety and welfare in general and the health, safety and welfare of the plaintiffs in particular, including, but not limited to warning those who might be exposed to the contaminated herbicides of the dangers inherent in such exposure.

30. Upon information and belief, the aforesaid herbicides were and still are inherently dangerous and thereby defective to the extent that such herbicides were and still are contaminated with toxic synthetic organic chemicals, and by reason of such contamination dangerous when used.

31. That the "corporate defendants" knew that the contaminated herbicides they manufactured and marketed, were to be used and would be used without substantial change and as a result of such intended use the plaintiff veterans would be exposed to toxic synthetic organic chemicals as aforesaid.

32. That there is a great disparity in economic and technological resources between the individual plaintiff veterans and the multi-national conglomerate ""corporate defendants".

33. That as a result of the conduct of the "corporate defendants" complained of herein, the plaintiffs sustained serious and severe injuries as a result of which they have suffered grievous personal injury and have become ill and disabled, suffered pain and economic loss, and in certain

cases have died; incurred medical expenses and other economic loss.

34. That as a result of exposure to products manufactured and marketed by the "corporate defendants" although such products were known to said "corporate defendants" to be contaminated as aforesaid, plaintiffs and all others so unfortunate as to be similarly situated and at risk have sustained and, upon information and belief, will sustain further, general and special damages.

AS AND FOR A
SECOND CAUSE OF ACTION
PLAINTIFFS ALLEGE:
NEGLIGENCE

35. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through "34" of this Complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

36. Although, upon information and belief, the "corporate defendants" knew, or with the exercise of reasonable concern for the public health, safety, and welfare should have known, of the dangerous properties and toxic characteristics of polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs), nevertheless said "corporate defendants" failed to warn the plaintiffs and others of the risks associated with exposure to those toxicants.

37. Upon information and belief, the "corporate defendants," by and through their agents, servants and employees were negligent, reckless and careless, and failed to exercise reasonable care and caution or demonstrate concern for the public health, safety and welfare commensurate with the economic power and technological resources of said "corporate defendants" when they failed to warn plaintiffs and others of the danger to which they were exposed.

38. Upon information and belief, the "corporate defendants" manufactured and marketed products contaminated with toxic synthetic organic chemicals in wilful, wanton, and reckless disregard of the public health, safety and welfare and the health, safety, and welfare of the plaintiffs herein and others as aforesaid.

AS AND FOR A
THIRD CAUSE OF ACTION
PLAINTIFFS ALLEGE:
BREACH OF WARRANTY

39. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through "34" of this Complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

40. Upon information and belief, the "corporate defendants" expressly and impliedly warranted that persons such as plaintiff veterans and others whom they knew or should have known would be exposed to contaminated herbicides would be safe from personal injury attributable to such exposure.

AS AND FOR A
FOURTH CAUSE OF ACTION
PLAINTIFFS ALLEGE:
INTENTIONAL TORT

41. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through "34" of this Complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

42. The Plaintiffs seek judgment DECLARING that continued manufacture and marketing of phenoxy herbicides such as the 2,4,5-trichlorophenoxy aliphatics, pentachlorophenol (PCP) and its salts by the "corporate defendants", individually or collectively, although known by said "corporate defendants" to be contaminated with toxic synthetic organic chemicals such as polychlorinated dibenzo-

p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs) is an intentional tort.

AS AND FOR A
FIFTH CAUSE OF ACTION
PLAINTIFFS ALLEGE:
IN EQUITY

43. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through "34" of this complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

44. Upon information and belief, the "corporate defendants", have steadfastly refused or failed to remove consumer products, known to be contaminated with toxic synthetic organic chemicals from international and interstate commerce and local markets although said "corporate defendants" know, or with reasonable concern for the public health, safety and welfare should know, of the danger associated with exposure to such contaminated products.

45. That the the contamination of consumer products, as aforesaid presents a significant continuing risk of harm to plaintiffs and others.

46. Upon information and belief, unless restrained by this Court, the "corporate defendants," their subsidiaries, associated venturers, agents and employees, will continue to manufacture and market, products contaminated as aforesaid.

47. That the continued manufacture and marketing of contaminated products by the "corporate defendants," although known by them to be contaminated with toxic synthetic organic chemicals, presents an imminent danger of serious, permanent, and irreparable damage to the public health, safety and welfare in general and the health, safety and welfare of the plaintiffs in particular.

48. That the continued manufacture and marketing of contaminated consumer products by the "corporate defendants" although such products are known to said

"corporate defendants" to be so contaminated, is a continuing tort affecting all the individual plaintiffs still alive and others.

49. That the continued manufacturing and marketing of consumer products by the "corporate defendants" although such products are known to said "corporate defendants" to be contaminated with toxic synthetic organic chemicals, is a continuous and continuing nuisance.

AS AND FOR A
SIXTH CAUSE OF ACTION
PLAINTIFFS ALLEGE:
NUISANCE

50. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through "49" of this Complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

51. That the illness and disability of the plaintiffs is attributable to, resulted from, or has been aggravated by, the maintenance of a continuous and continuing nuisance by the "corporate defendants" which manufactured and marketed products known to be contaminated with toxic synthetic organic chemicals in wanton and reckless disregard of the public health, safety and welfare.

52. That the illness and disability of the plaintiffs is attributable to, resulted from, or has been aggravated by, the intentional acts of the "corporate defendants" which manufactured and marketed products known to be contaminated with toxic synthetic organic chemicals in wanton and reckless disregard of the public health, safety and welfare.

AS AND FOR A
SEVENTH CAUSE OF ACTION
PLAINTIFFS ALLEGE:
DECLARATORY JUDGMENT CLAIMS

53. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through

"52" of this Complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

54. This is a proceeding seeking a Judgment declaring the rights and legal relations of the parties to the matter in controversy as more specifically set forth.

55. The Plaintiffs seek judgment DECLARING their rights and the rights of all the people of the United States to the protection of their personal health, safety and welfare from the toxic effects of phenoxy herbicides manufactured and marketed by the "corporate defendants".

56. The Plaintiffs seek judgment DECLARING their rights and the rights of all the people of the United States, not only of this generation but of those generations yet unborn, to have the "corporate defendants", their several subsidiaries, associated business venturers, agents, and employees, by reason of their economic stature and technological resources, protect the public health, safety and welfare to the extent of eliminating the manufacture and marketing of products contaminated with toxic synthetic organic chemicals such as polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs).

57. The Plaintiffs seek judgment DECLARING their rights and the rights of all the people of the United States, not only of this generation, but of those generations yet unborn, to protection of their personal health, safety and welfare, and their Environment (considered as the complex system resulting from the interactions among natural, social, and societal resources and the natural, social, and societal processes operative upon those resources) from damage or degradation attributable to the toxic effects of contaminated herbicides manufactured and marketed by the "corporate defendants."

58. The Plaintiffs seek judgment DECLARING that manufacturing and marketing phenoxy herbicides such as the 2,4,5-trichlorophenoxy aliphatics, pentachlorophenol (PCP) and its salts contaminated with toxic synthetic organic

chemicals such as polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs) by the "corporate defendants" has represented, now still represents, and will continue to represent for some indeterminate future time (the duration of which depends upon the time necessary for natural or human processes to detoxify such toxic synthetic organic chemicals) a threat to the public health, safety and welfare and that such a threat violates the rights retained by the plaintiffs and all the people of the United States not only of this generation, but of those generations yet unborn, under the Ninth Amendment of the Constitution of the United States, and as such protected under the "due process" and "equal protection" clauses of the Fifth Amendment and the "due process," "equal protection," and "privileges or immunities" clauses of the Fourteenth Amendment of the Constitution of the United States.

59. Plaintiffs seek judgment DECLARING that the "corporate defendants," by reason of their economic stature and technological resources, are Trustees of the public health, safety and welfare to the extent that such "corporate defendants" actually had, or now have, or with the exercise of reasonable concern for the public health, safety and welfare should have had or now should have, knowledge of the dangerous properties and toxic characteristics of the products they manufacture and market as herein alleged.

60. Plaintiffs seek judgment DECLARING that continued promotion of phenoxy herbicides by the "corporate defendants", although known by them to be contaminated with toxic synthetic organic chemicals is a breach of the fiduciary duty and obligation owed to plaintiffs by said "corporate defendants" because of their economic stature and technological resources, and as such is actionable by the Plaintiffs against said "corporate defendants" in Equity.

WHEREFORE the Plaintiffs, individually and collectively demand judgment of the corporate defendants, THE DOW CHEMICAL COMPANY, HERCULES

INCORPORATED, DIAMOND SHAMROCK CORPORATION, MONSANTO CO., and THOMPSON-HAYWARD CHEMICAL COMPANY for the equitable relief and damages heretofore stated, all together with such other and further relief as to this Court shall seem just and proper under the circumstances.

DATED: Patchogue, New York
14 October 1979

/s/ Victor John Yannacone, Jr.
Victor John Yannacone, Jr.

YANNACONE & YANNACONE
Professional Corporation
Plaintiffs' Attorneys
Office & P. O. Address
Post Office Drawer #109
Patchogue, New York 11772
(area code 516) 654-2299

VERIFICATION

STATE OF NEW YORK)
COUNTY OF SUFFOLK)

MICHAEL F. RYAN and MAUREEN O'CONNOR RYAN, each severally being duly sworn, depose and say that they are each individual plaintiffs in this action and that they bring this action also as the parents of KERRY ANN RYAN, an infant under the age of fourteen years, and as representatives of all those so unfortunate as to be similarly afflicted and that they have read the foregoing THIRD AMENDED COMPLAINT and know the contents thereof, that the same are true as to their own knowledge except as to those portions therein alleged upon information and belief, and as to those portions they believe them to be true.

/s/ Michael F. Ryan
MICHAEL F. RYAN

/s/ Maureen O'Connor Ryan
MAUREEN O'CONNOR RYAN

Sworn to before me, this
14th day of October, 1979

/s/ Victor John Yannacone, Jr.
Victor John Yannacone, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

PLAINTIFFS' REPLY MEMORANDUM ON CLASS CERTIFICATION

[Filed Oct. 17, 1979]
[Excerpt]

EDWARD F. HAYES, III
Malerba, Abruzzo, Clancy, Hayes, Downes & Frankel
434 New York Avenue, Huntington, New York 11746
IRVING LIKE
Reilly & Like
200 West Main Street, Babylon, New York 11702
HYMAN HERMAN
Abrams & Herman
163 Half Hollow Road, Deer Park, New York 11729
ALBERT J. FIORELLA
1565 Franklin Avenue, Mineola, New York 11501
EUGENE J. O'BRIEN
Burke, Curry, Hamil & O'Brien
138 Mineola Boulevard, Mineaola, New York 11501
W. KEITH KAVENAGH
South Gillette Avenue, Bayport, New York 11705

/s/ Victor John Yannacone, Jr.
Victor John Yannacone, Jr.
YANNACONE & YANNACONE
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79-10-17

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RULE 23(a)(3) - TYPICALITY

"Typicality," in the context of FRCP Rule 23, refers to the general character of the claim of the named plaintiffs in relation to the class of all the claims sought to be represented. Factual identity between the claims of the named plaintiff and those of the class as a whole has never been required to fulfill the conditions of typicality. Although corporate defendants would reply upon *Amswiss International v. Heublein, Inc.*,69 FRD 663, 667 (ND Ga 1975) to support their challenge to class certification, that court succinctly defines the typicality requirement of Rule 23(a) as being satisfied if, "in the course of proving its own claim plaintiff also proves the claim of the other members of the class."

The corporate defendants argue that it is "extremely unlikely that any veteran's claim is 'typical' of any other veteran's claim." (MDL381 D66, DOW Memorandum, p. 13). However, the fundamental issue of liability is common to every veteran of the armed conflict in Southeast Asia who was exposed to the contaminated herbicides manufactured and marketed by the corporate defendants. Each veteran was exposed to the contaminated herbicides in Southeast Asia and every veteran sustained some personal injury as a consequence of such exposure. While no two veterans may have been damaged to the same extent by exposure to contami- **[Page 22]** nated herbicides, plaintiffs have offered to prove that the symptoms with any exposure to contaminated herbicides (dioxin effects) are well-defined. Therefore, as to the liability of the corporate defendants and the general criteria for determination of plaintiffs' injuries and assessment of plaintiffs' general damages, the claims of

the representative plaintiffs are typical of those of the entire class of plaintiff veterans and their families and satisfy Rule 23(a)(3).

* * * *

Excerpt of Brief for Plaintiffs-Respondents filed in The United States Court of Appeals for the Second Circuit, in *In re Agent Orange Product Liability Litigation*, No. 80-7079

[Filed Apr. 11, 1980]

* * * *

[36] developmental defects among the veterans' children). Numbers are properly cognizable by the court in making a determination with respect to federal interests and the application of a nationwide federal rule of law in general.

The argument that it is illogical to base any distinction on a body-count of the plaintiff veterans and their families also overlooks the fact that the distinction is also heavily dependent on the conduct of the defendants. The allegations of TAVC, when established, will demonstrate that the corporate defendants committed a toxic tort of such magnitude as to be almost hitherto unknown to the Law. Such a tort committed by war contractors against thousands of American servicemen is quite a different thing, qualitatively, from the occasional defective shell, grenade or even ejection seat.

POINT IV.

It Was Within the Sound Discretion of the District Court to Decline at This Time to Strike Claims Made on Behalf of Certain Classes of Persons at Risk of Injury and for the Creation of a Trust fund.

The war contractors complain that the District Court declined to enter an immediate order striking certain paragraphs of the TAVC an dismissing any and all claims on behalf of those plaintiffs "at risk" of suffering damage in the future such as neoplastic disease (cancer) and birth defects among their unborn children as a result of the defect of contaminated phenoxy herbicides manufactured and

marketed by the corporate defendants. The war contractors are equally strident in their demand for an order striking the allegations of the complaint seeking to declare the corporate defendants, by reason of their **[37]** economic stature and technological resources, trustees of the public health, safety and welfare and impose on the corporate defendants a fiduciary obligation to warn of any evidence that a product they manufacture, formulate, advertise, promote, market or sell may be toxic to human beings or other animals.

The trial judge to whom multidistrict litigation has been assigned is delegated broad powers to control the progress of the case from the moment it is assigned. The gravamen of defendants' appeal is that the trial judge refused to rule on part of a motion to dismiss and that the presence of "at risk" classes and the demand for relief in the form of a trust fund will create confusion in connection with the proper definition of the dimensions and nature of the action, as well as the scope of discovery (Appellants' Brief 42, 44).

The difficulties envisaged by the war contractors on this point are speculative, at best. The trial court, in its wisdom, elected to defer ruling on this part of defendanrs' motions until, among other things, this Court passed on the question of federal jurisdiction, and the question of class certification was again before the trial court. It may be reasonably assumed from the extensive pre-trial conferences conducted by the Court on April 18, 1979, (A.IV. 2320); June 21, 1979; (A.III, 1176); July 18, 1979 (A.III, 1376); October 3, 1979 (A.II. 903); November 2, 1979 (A.III,1642); December 21, 1979, (A.III, 1687); January 16, 1980 (A.IV. 2155); and Febraury 1, 1980 (A.IV, 2175) that some development of the record and some disposition of the more than fifty affirmative defenses raised by the corporate defendants would be in order before the Court considers one of the most important aspects of the "Agent Orange" litigation -- the latency period in the development of clinical symptoms of neoplastic disease following exposure to a toxicant, and the time between manifestation of genetic damage in the tragic

case of children born with developmental defects **[38]** and the time when the genetic damage was done to their fathers.

Clearly the motions by the corporate defendants were premature and just another example of their frantic efforts to avoid discussion of the merits of the veterans claims of injury and damage as set forth in the several complaints (Complaint §§32-89, A.I., 41-55; Amended Verified Complaint (AVC) §§49-117, A.I. 275-295; Second AVC (SAVC) §§50-78, A.II. 807-818, 1006; Third AVC (TAVC) §§23-60, A.II. 1018-1030), and Offers of Proof (July 9, 1979, A.II. 603-626, 640-662, 689-691). The District Court took an appropriate course by deferring consideration of the corporate defendants motions until at least some of the merits of the veterans claims have been adjudicated. The war contractors have shown nothing arbitrary, capricious and unreasonable in the decision of the District Court.

The appeal of the war contractors on this point is little more than an attempt to take an interlocutory appeal from a class action determination that has not been made. Class action determinations, of course, are not ordinarily appealable on an interlocutory basis. Interlocutory appeals of class action determinations was fundamental to the entire action *Shelter Realty Corp v. Allied Maintenance Corp.*, 574 F.2d 656 (1978 CA2), as where the individual recovery would be so insignificant that the suit would not continue as a private action, *Master Key Antitrust Litigation*, 528 F.2d 5, 10-11 (1975 CSA2); where the class action issue is entirely separate and distinguishable from the main issues in the litigation, *Windham v. American Brands, Inc*, 565 F.2d 59 (1977 CA4); or where failure to determine the issue will result in "irreparable harm" to a litigant. The appeal on this point hardly qualifies for such treatment.

In arguing against the "at risk" claims in TAVC, the war contractors assume that no injury has been inflicted, **[39]** or that the consequences thereof will be too remote in time to establish a causal relationship. Both of these positions are

erroneous. The "injury" in the Agent Orange cases have already occurred. The plaintiffs "at risk" have already been exposed to the toxic substance. Only time will tell whether some vital cell within their body has become a ticking toxic time bomb which will explode into a cancer or contribute defective genes to a child who will come into the world burdened with the kind of catastrophic polygenetic developmental defets that have afflicted the infant plaintiff Kerry Ryan (79 CIV 747 USDC/EDNY).

Not all courts adhere to the rule an injury and damage are not compensable simply because they are not presently and immediately observable (Appellants' Brief at 46). In *Gomes v. Taylor*, (D.R.I. March 21 1979 No. 77-0228), for example, a state prison inmate was permitted to recover for the increased likelihood of contracting cancer due to blood tests performed by lawful authorities in the course of an investigation. Similarly, in *Payton v. Abbott Laboratories*, 83 F.R.D. 3832 (D. Mass. 1979, (a "DES" case similar to those cited by the war contractors, conditional certification of an"at risk" class was permitted absent a controlling determination that there was no cause of action whatever on behalf of the questioned class under controlled law. There has been no such determination in this case.

There are a number of decisions which hold that one is only "injured" in the legal sense when the accumulated effects of the deleterious substance manifest themselves. *Urie v. Thompson*, 337 U.S. 170 , 187 (1949); *Usery v. Turner Eikhorn Mining Co.*, 428 U.S. 1, 7-11 (1975); *Brush Beryllium v. Meckley*, 285 F.2d 797 (1960 CA6); *Hungerford v. United States*, 307 F.2d 99 (1962 CA9); *Cox v. Stanton*, 529 F.2d 47, 48 (1975 CA4); *Chemical Leaman v. Interstate Commerce Commission*, 593 F.2d 241 (197 CA3).

[40] That the "at risk" class is comprised primarily of infants gives special weight to the District Court's determination that the "at risk" claims should not be dismissed out of hand. *Bergstresser v. Mitchell*, 577 F.2d 22

(1978 CA8) holds that damage to the chromosomes of parents which appear as genetic deformities in children, even though such damage appears prior to conception, is a separate cause of action. *Accord*, *Woods v. Lancet*, 303 N.Y. 349,102 N.E.2d 691 (1951).

The Veterans' "at risk" claims are not without merit and therefore it was entirely within the competence of the District Court to reserve decision on their legal sufficiency until a later, more appropriate stage in this litigation. Much the same may be said for the "trust fund" allegations of the complaint.

The "trust fund" concept offers a solution to the most fundamental and vexing problems of modern litigation. As science and technology advance, there will undoubtedly be more cases of toxic torts as careless or uncaring corporate manufacturers distribute contaminated products without regard for the long term effects of the contaminants on man and the environment. It is for society to decide whether to leave the burden of an injury where it falls upon the victim as the price of the new technology, to provide sporadic compensation through application of the tort theories of another age, or to adapt those theories to the complexities and realities of modern society and to effect uniform compensation where such injuries are the result of the concerted activities of an industrial oligopoly.

If the concerted activities of the corporate defendants had been merely price fixing, and if the plaintiff veterans and their families were small business owners who had suffered economic loss, even if only measured in pennies, the door to the Courthouse would open under the anti-trust laws, and the bulk of the litigation would be conducted by

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381

United States Courthouse
Uniondale, Long Island
New York

August 24, 1982
10:30 o'clock, A.M.

Before:
HONORABLE SOL SCHREIBER, SPECIAL MASTER

[1462] SPECIAL MASTER: Why is it necessary that the entire 2.6, is it?

MR. YANNACONE: Yes.

SPECIAL MASTER: -- million be the parameter of the class?

MR. YANNACONE: That is the universe of the class that Judge Pratt has established. Those are all the people who can be Agent Orange plaintiffs.

SPECIAL MASTER: When did he establish that?

MR. YANNACONE: In Pretrial Order number 26. That's the parameter of the class.

There are only 2.46 -- only -- 2.46 million people who can be members of this class.

SPECIAL MASTER: Counsel, I would like a copy of that Pretrial Order.

Are you saying to me that the plaintiffs' position in this case is that they -- in order to have a B-3 class, you will undertake --

MR. YANNACONE: No.

SPECIAL MASTER: -- to notify 2.46 million people?

MR. YANNACONE: No.

MR. RIVKIN: That's our position, sir.

SPECIAL MASTER: Wait a second. I know that

* * * *

[1468] So with that, number one, it was my feeling that there should be no class but if in fact there is going to be a class, it should be a class that is fair, equitable and just to the veterans and to all parties.

So that as Mr. Yannacone says, anybody that was over there had an exposure. Whether it's true or not is immaterial. That's the contention.

How can you get the amount of people who are -- suffering from symptoms unless you notify them all and say all of you folks should be on notice that if any of you have the following.

You can't pick a man because he made a claim and say, because you made a claim, you should be part of this class, when next door neighbor might not have been -- have made a claim and is suffering from something which he believes came from an exposure.

So it is my contention, sir, that in accordance with the claim of the plaintiffs and the prior comments of the Judge, that the class is 2.46 or whatever it is and it is the plaintiffs' obligation, not the Government and not the Master or the Judge to find out how they are going to notify them.

SPECIAL MASTER: Oh, no, no.

[1469] MR. RIVKIN: Wait. Let me finish.

SPECIAL MASTER: No. Mr. Rivkin, remember, it is a class action. It is the responsibility of all parties to the case, plaintiffs, defendants, the Judge, the Master, to determine what is the appropriate and legal and fair way of handling a class.

MR. RIVKIN: I accept that.

SPECIAL MASTER: It is not the plaintiffs' position.

MR. RIVKIN: What I am saying, if the order came down that you must notify X amount of veterans, all those exposed, and it must be notified in this manner, whatever it may be, it is then you -- and you must notify by mail or otherwise, it is then up to the plaintiffs to get the list and do the mailing.

SPECIAL MASTER: I --

MR. RIVKIN: I don't think it is up to the Master or the Court or the Government, unless they voluntarily want to help out. They have no obligation to take the burden of the plaintiff who wants to be the class lead counsel to say where am I going to get the names from. He can't come on the one hand

* * * *

[1489] you recognize that this is unlike any other personal injury action that has been brought before the Courts of this country and we are insisting that the liability of the defendants extends to the entire class of 2.46 million people, limited only to those who are in the group and have manifest physiological or organic damage. What we are saying to you, we can identify a finite number of ill people today or dead veterans today or deformed children today. And that's the number which even by the most extreme reading of ***Eisen*** is all that actual notice must be given to. We are saying there is, however, a remainder in that class who between now and next June can develop the soft tissue sarcoma symptom that will make them clearly members of the class which could not

have been demonstrated today, but will make them death claims a short time afterwards.

Now, you are telling us to chose now. And this is the breath of our fiduciary obligation, which we -- we are just not going to do it, when you are telling us in an intellectual exercise to pick a method and chose a position.

SPECIAL MASTER: Counselor, wait a second.

MR. YANNACONE: We are not going to --

[1490] SPECIAL MASTER: The Court doesn't ask you to pick. The Court asks to comply with the law as developed.

Now, if you are suggesting that this case is so unique that the Court ought to re-develop the entire law of class actions and rule 23 and notice, that's an interesting hypothesis or interesting suggestion on your part. But the idea that the Court is telling you to pick -- the Court is ordering you to comply with the rules.

MR. YANNACONE: Judge --

SPECIAL MASTER: I mean if you are saying --

MR. YANNACONE: Do you want to put that in order.

SPECIAL MASTER: If you don't know what the rules are or we can't figure out what the rules are, then I am saying to you it's time we got to the point of deciding the issue.

MR. YANNACONE: Then decide it.

SPECIAL MASTER: Wait a second. Decide the issue. I want you to tell me, this Court, what you want the Court to do as far as notice. I said to you, prepare a notice and tell me how you are going to distribute it. You have an obligation

* * * *

[1499] added another 200 thousand or so.

MR. YANNACONE: There is another --

SPECIAL MASTER: What makes that group from the group of the 2.4? I don't understand.

MR. YANNACONE: The entire -- according to the government -- and we have only the government to go by, the names and addresses of the 2.46 million people who served in Vietnam are not ascertainable at this time through the means of searing the Federal Government files and records. They cannot identify who went to Vietnam. They might, given a great deal of money and a great deal of time, give us the names of the 8 million who served in the armed forces regardless of branch from 1962 to 1974. They would not be able to tell us the branch they served in except for the Marine Corps, or whether they served overseas or in Vietnam.

SPECIAL MASTER: So you now extended it from 2 point something to 8 million.

MR. YANNACONE: I haven't. I know what my class is. My class is those people who are ill among the 2.46 who went to Southeast Asia. We know now for a fact that we can identify through veteran service groups and 16 state veteran agencies a group

* * * *

* * * *

[1520] couple of weeks to tell us where they stand with respect to the subpoena that was served, as well as the information that was being sought concerning the names and addresses of veterans.

MR. PAKULA: If there are to be meetings with the Government, may the defendants attend those meetings?

SPECIAL MASTER: The defendants should be attending all meetings with the Government.

MR. PAKULA: We -- this whole -- a lot of what happened this morning was based on representations that what the Government said at a meeting that none of the defendants attended.

SPECIAL MASTER: Let me see if I can -- I think both sides can approach the Government and speak to them separately. But I think we are getting to a point where the Government ought to be making statements and

representations to both sides in the same room, rather than to individual sides.

[1521] MR. PAKULA: Second thing is that the complaints in this case appear to be pleaded on behalf of at risk people without physiological ailments. A motion was made some time ago to dismiss claims of at risk people on the grounds that they didn't state a claim upon which relief could be based. Judge Pratt deferred the determination of that motion, really tabled it.

SPECIAL MASTER: Pending?

(continued on next page.)

[1522] MR. PAKULA: I am not sure what appears. I am not sure whether this case involves at risk plaintiffs who don't have physiological ailments or whether it does, and I think that should be resolved one way or the other, and soon.

SPECIAL MASTER: What is the defendants' position? They do not want at risk people in it?

MR. PAKULA: The defendants' position is that that -- to the extent the complaints, whichever sample complaint we were using as the complaint upon which the original motion practice was based, to the extent that they plead a claim on behalf of people that are not sick, that's not the claim upon which relief can be based. It is a defective claim. It should be dismissed.

SPECIAL MASTER: They will --

MR. PAKULA: That's the position of my client. I think all.

SPECIAL MASTER: Your position is that they will not be part of any class.

MR. PAKULA: Our position is that those claims, that the complaints don't state a cause of action, to use State Court language, which I find much easier to use. That has never been ruled upon, so we haven't gotten to the next question.

[1523] SPECIAL MASTER: Of course, if they are not part of the class, if the at risk people are not part of the class, then subject to the limitation periods in individual statutes, they may or may not have claims if they develop what they claim to be allegations of injury.

MR. PAKULA: I guess that's so.

MR. SILBERMAN: If and when there is a class certified, there is going to have to be a new class action complaint, which may or may not contain such claims and so which motions would have to be addressed.

SPECIAL MASTER: What do you mean if it is certified? I thought the Judge has already ruled.

MR. SILBERMAN: I don't know that it's been certified.

MR. GORDON: The Court has only conditionally --

SPECIAL MASTER: Certified?

MR. GORDON: Conditionally, conditionally certified it, asserting there would be a formal certification order later. At that time the new complaint would be served with representative plaintiffs.

[1524] SPECIAL MASTER: That's a good point.

MR. PAKULA: We don't know who the plaintiffs are.

MR. YANNACONE: Your Honor -

SPECIAL MASTER: Let me ask the plaintiffs. Are you, Mr. Yannacone, are you taking the position that this class should contain not only those with present injuries, but those who have been categorized as at risk, meaning they are susceptible of developing injuries further down the line?

MR. YANNACONE: Judge, at the risk of delivering a short lecture on the medicine in this case, the exposure to the toxicant produced a physiological event, an injury within the meaning of the word "injury" in the technical law of torts.

SPECIAL MASTER: Yes, I know. But what I am asking you -

MR. YANNACONE: The damage is not yet manifest. I will answer your question.

SPECIAL MASTER: Mr. Yannacone, it is always enjoyable to hear and to speak with you, but I wish, with all due respect, you answer the specific question,

Are you saying to me that you are forming a class here which are people who have no -- in other **[1525]** words, the seeds of future injury?

MR. YANNACONE: No. Judge, you must let us define our people.

SPECIAL MASTER: You cannot. Wait a second.

You can only -

MR. YANNACONE: Judge --

SPECIAL MASTER: You can only recommend. The Court decides. Mr. Yannacone, you cannot be both the advocate and the judge at the same time.

MR. YANNACONE: Your Honor, we made a choice and we are defining our people this way. You do not have to agree. You do not have to approve it. But our definition is this: if you were exposed to dioxin contaminated phenoxy herbicides -

SPECIAL MASTER: Okay. That's step number one.

MR. YANNACONE: You have suffered a physiological injury.

SPECIAL MASTER: Why?

MR. YANNACONE: Because of the medicine, the first exposure.

SPECIAL MASTER: You mean, anyone who was exposed to it?

MR. YANNACONE: We are prepared to establish **[1526]** by a fair preponderance of the substantial credible -

SPECIAL MASTER: Mr. Yannacone.

MR. YANNACONE: -- medical evidence -

SPECIAL MASTER: Why do you try to design a case that is so -- and I don't mean to be critical in saying -- when I say "design," -- that is so potentially -- everybody who was in Vietnam was exposed under your theory. Am I correct?

MR. YANNACONE: Judge -

SPECIAL MASTER: To it?

MR. YANNACONE. Not necessarily.

SPECIAL MASTER: Why not?

(continued on next page)

[1527] MR. YANNACONE: We have a model in this case. When this complaint was drafted, it was designed and Budd, Larner, of course, knows better than any other firm sitting on that side of the table. This was designed to avoid the problem of the asbestos litigation today.

We knew that Agent Orange --

SPECIAL MASTER: What is the problem of the asbestos?

MR. YANNACONE: The problem is that the medical evidence clearly indicates that the toxic physiological effect, the injury took place twenty years ago when the worker was first exposed to asbestos and the manifestation of that injury, the damage within the meaning of the law, occurs twenty or thirty years later.

SPECIAL MASTER: Okay. So your theory then is that anyone who was exposed, in effect, does not have a problem with the statute of limitations because he's already a viable member of the class and part of this case?

MR. YANNACONE: He's been injured in the technical sense of injury.

SPECIAL MASTER: What happens if this case **[1528]** is finally resolved a year from now or two years from now and you have been successful in withstanding the defendants' affirmative defense and you have been successful in showing fault, the cases are then redistributed throughout the United

States to various Federal Courts, to try, as you call it, individual causation and damages?

MR. YANNACONE: Porximate cause.

SPECIAL 14ASTER: Proximate cause and 15,000 at risk people are still members of the class but still are in an at risk position?

What are you saying to that court?

MR. YANNACONE: You're in exactly the position today and I'll give you a New York analogy, that we would like to point out. It's a catch-22 situation, but it exists in the New York law.

I represent a --

SPECIAL MASTER: No, no. With all due respect to the New York law, I do not want to hear about New York law.

I want you to tell me what will happen to 150,000 -

MR. YANNACONE: A decision will have to be made by the Court because the cause of action is **[1529]** this: I was exposed and I can prove I was exposed in Vietnam. I have not yet manifested any of the injuries, any of the damage. The clinical evidence of damage that might occur to me. And if you are in the State of New York you now have a phobia case. If you are in certain other states, you are now out of court.

SPECIAL MASTER: Wait a second. Wait.

I know the New York cases on phobia. They do not rule that you have an unlimited claim to be brought whenever you decide that the phobia is developed.

MR. YANNACONE: He has to bring it then. He's got to decide and you must let me tell you the asbestos problems so you understand where we come from in this.

If you represent -

SPECIAL MASTER: Counsel, if you spent as much time reviewing asbestos philosophy and legal issues as I

have, you would preface your remarks by suggesting that maybe there is something that I don't know about it. I have spent as much time as you trying to figure out where those cases are going and what society can do.

[1530] But tell me -

MR. YANNACONE: May I present -

SPECIAL MASTER: What you are trying to do is avoid the statute of limitations by at risk.

MR. YANNACONE: No, Judge. I have this problem and it's a real problem. In all your review of the asbestos case, I will wager you are not aware of the workers' comp problem. A man walked into my office because I'm a specialist in workers' comp, and says I handled asbestos eight weeks ago. I got a lung full. They just took some samples of my sputum and they found ferruginous particles. I have been exposed and my doctor just told me if I am never exposed to asbestos again in my entire life, I have a -- and I don't smoke, I have a probability that is finite of 24 years to 30 years from now developing mesothelioma and dying miserably of lung cancer.

SPECIAL MASTER: That's a very fine doctor.

MR. YANNACONE: That particular set of facts exists and the Liberty Mutual Insurance Company is involved in it, as are a lot of other carriers. That state of facts exists today. Those people are within, even the draconian statute of limitations of **[1531]** the State of New York and can now commence an action. They have no clinically manifest damage.

SPECIAL MASTER: The Court permits the case to stand forever?

MR. YANNACONE: Nobody has brought the action yet because the New York law has just been firmed up in this area a year ago.

But this is a problem that's discussed every single day.

SPECIAL MASTER: Why do you think -- this is going to sound awful when somebody reads it. But why do you think, Mr. Yannacone, that you have to carry upon your shoulders the burden of every problem arising out of the Vietnam war?

MR. YANNACONE: Judge, I've left out all the political problems.

SPECIAL MASTER: I know that.

MR. YANNACONE: All the social problems and all the economic problems.

I am only interested in a problem of young men who will not manifest damage until some time in the future. The case -

SPECIAL MASTER: Why don't you let society take care of that? I mean, we have -

[1532] MR. YANNACONE: Why should you and I as the taxpayers who are society, with a capital S, if we win the case, on established liability, pay the cost of taking care of somebody whose cancer arises as has happened? We have a number of veterans who had not manifest symptoms seven months ago, except chloracne, and I got a call from a widow seven weeks ago and my husband who wrote you and said he had a rash seven months ago just died of soft tissue sarcoma, which we believe is a causally related cancer.

SPECIAL MASTER: I don't want to make it sound worse than it is going to read. But there is a manageable -- manability issue that you are treating, with all due regard, Mr. Yannacone, too lightly. You cannot -- I mean, you think the Court is going to approach this case on -- like a chinese menu?

MR. YANNACONE: No, it's not.

SPECIAL MASTER: That it's -- that it could take categories A, B, C, D, and E and if it doesn't like E, it will settle for A, B, C, and D?

MR. YANNACONE: Judge --

SPECIAL MASTER: The law -- the courts do not work that way.

[1533] MR. YANNACONE: If we establish liability, the --

SPECIAL MASTER: You cannot go forward unless you establish a class.

MR. YANNACONE: The class is so easy to define. The class is everyone who was exposed and who manifests physiological injury.

The only thing the Court has to do --

SPECIAL MASTER: What do you mean by "physiological injury"?

MR. YANNACONE: Physiological injury is regularly defined as that which is manifest upon certain kinds of chemical, physical and biological tests.

MR. RIVKIN: He's giving up his at risk claims?

MR. YANNACONE: No, I am not.

I can show you hundreds of claimants who have physiological injury but no clinical damage yet. You know the kind of claimants I am talking about and I know the kind of claimants we are talking about.

Your Honor, what I am saying to you --

SPECIAL MASTER: What you are saying to me, you know what you are saying to me?

[1534] MR. YANNACONE. It's a big case.

SPECIAL MASTER: No, no. It's a big case whether or not it's in it.

But what you are saying to me is you're giving me an interpretation that in effect can lead to a use of the statute of limitations in many jurisdictions to bar your claimants.

MR. YANNACONE: What do you think the defendants have argued?

SPECIAL MASTER: No, no. Wait a second.

Your interpretation can bar them. Their interpretation would, in my judgment, not bar them because what they are saying is at risk is not an identifiable medical area. So, therefore, in those states where discovery is the rule, the at risk defendant is not barred by the limitation.

But what you are saying is that if we accept your physiological approach, which is an interesting one, I will have to read it now, but what you are saying is that the at risk physiological approach will put a bar in those jurisdictions.

MR. YANNACONE: Judge, I didn't invent that. The carriers represented by these counsel invented it in the asbestos case.

[1535] SPECIAL MASTER: Wait a second. Wait a second.

They do not invent things. They argue from their position.

(continued on next page.)

[1536] MR. YANNACONE: No, they don't. They go out and hire an expert witness who comes up with the right theory.

SPECIAL MASTER: Mr. Yannacone, maybe I spent too many years in practice and on the bench, but merely because you are a plaintiff or merely because you are a defendant does not mean you are wearing the white hat.

MR. YANNACONE: No.

SPECIAL MASTER: There is a lot more to it than that.

The argument that somebody develops a theory -- I mean, with all due regard to asbestos defense lawyers, while they are doing a marvelous job, there is still a lot of money being paid, so they aren't developing your -- as your concept is, theories that are denying everybody everything.

MR. YANNACONE: In New York they are and in sixteen other states that will follow the New York statute of limitations.

SPECIAL MASTER: I think we have had too much philosophical analysis and if I could -- if I could strike the record, I would do it right now.

MR. YANNACONE: Your Honor, could I give you

* * * *

[1539] MR. RIVKIN: Sir, could I offer what I think might resolve this? I don't think the plaintiffs will oppose it.

Instead of everybody going down to Washington --

SPECIAL MASTER: Everybody does not have to.

MR. RIVKIN: We have the Government coming here next Thursday on CBS because they said they are going to appear. Can't they appear at that time and give us their position on whether they are going to cooperate on that, if that is what you are interested in finding out?

SPECIAL MASTER: I do not know. Let me decide whether it will be here or Washington. Let me get to this position of at risk because, frankly, I take it, the defendants' position is that, a, that there should be no class, but, b, if there is a class, it should not contain at risk claimants.

Do I put it in a simplified fashion? I am not asking for a definitive position. I think that's a general feeling I get.

MR. PAKULA: The position is -- our position is that the at risk claimants don't have a cause of action so they can't be in anything.

(continued on next page.)

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

PLAINTIFFS' SECOND SUPPLEMENTAL MEMORANDUM ON CLASS DEFINITION AND SUPPLEMENTAL MEMORANDUM ON GENERIC CAUSATION

/s/ Irving Like
Irving Like,
Chairman, Law Committee

/s/ Thomas W. Henderson
Thomas W. Henderson,
Chairman, Generic Causation Committee

Albert J. Fiorella,
Chairman, Management Committee

Dated: September 12, 1983

[2] Definition of Plaintiffs' Class

This part of the Memorandum is intended to define the plaintiffs' class in a very broad manner so that the outcome of this litigation will be dispositive as to all present and potential claimants. At this time, plaintiffs submit that the class include those whose injuries fall within particular Agent Orange profiles, which are believed to be associated with their exposure to dioxin contaminated phenoxy herbicides (including Agent Orange), supplied by the defendants to the military while serving in South East Asia during the Vietnam

War. (As to the word "associated", please see Generic Causation portion of this Memorandum.) Those profiles will include the entire spectrum of adverse health effects, a partial list of which is set forth in the Interrogatories propounded to defendants on September 9, 1983, specifically #48, and is attached hereto as Exhibit "A".

In defining the class broadly, flexibility is retained by the Court to redefine the class, based at least in part on those adverse health effects that may be established in the generic causation trial, that is, those associated with exposure to dioxin contaminated phenoxy herbicides.

In its Pretrial Order No. 26 dated December 29, 1980, the Court broadly defined the members of the class:

> "Here, the plaintiff class can be readily identified; they are persons who claim injury from exposure to Agent Orange and their spouses, children and parents who claim direct or derivative injury therefrom. The Court has intentionally defined the class in broad terms consistent with the demands of this litigation. If we begin with the broadest possible class, the issues common to all members of that class can be resolved. It may later prove advantageous to create subclasses for various purposes, e.g., for resolving statute of limitations claims, **[3]** for determining liability in 'negligence' as opposed to 'product liability' states, and finally, perhaps, for preserving the class action format prior to remand to the transferor judges so as to provide them with the greatest possible flexibility in ultimately determining the issues remaining after multi-district treatment has ended."
>
> (P. 5)

Plaintiffs propose that this definition should be expanded to also include Australian and New Zealander servicemen and civilians such as employees of government contractor and non-military relief organizations such as the American

Red Cross, who were also injured as the result of exposure to defendants' contaminated herbicides in South East Asia.

In the language just quoted, the Court has listed several obvious benefits deriving from the flexibility of a broad class definition. For at least three reasons, plaintiffs agree that flexibility is a proper goal and believe that, with the definition now submitted, such flexibility is retained.

Other advantages are present. For example, the obvious one is that a broad definition avoids under-inclusion of injured claimants. Specifically, such definition permits the proper inclusion in the class of those whose injuries and diseases, i.e. adverse effects, are found to be associated with dioxin exposure in the trial on generic causation. In a pragmatic sense, it will be infinitely easier to redefine the class from the broad to the narrow, rather than the converse. Finally, notice to a broadly defined class is preferable if the Court should later determine that (b) (1) (B) treatment is appropriate based upon whether the defendants' "limited asset fund" can be established.

* * * *

[5] Therefore, such a broadly defined class is preferable not only within the context of (b) (3) class treatment, but to facilitate the use of a (b)(1) class in combination with or as an alternative to a (b)(3) class.

Plaintiffs therefore believe that the Court's definition of the class as set forth in its Pretrial Order of December 29, 1980 is proper and urge that the plan of class identification and notice combining direct *Eisen* type notice and constructive notice utilizing the media offers the most reasonable and practical means of implementing class notification.

Generic Causation

The issue of generic causation in the form of dioxin-associated injury and disease and how it is to be handled in the context of the trial is obviously a crucial one. In this light, the following is submitted.

As noted in Plaintiffs' Memorandum dated June 6, 1983, in order to preserve and foster further the aspect of commonality, generic causation perforce must be defined broadly. The question which should be presented to the jury is simply:

Could dioxin have caused the plaintiffs' injuries?

or

Is dioxin *capable* of causing plaintiffs' injuries?

The question, in either form however, has two components.

The first such component is exposure of the veterans to dioxin - whether by inhalation, ingestion, or external absorption. It is essential to note at this point that *any* level of dioxin contamination of *any* phenoxy herbicide manufactured and sold by *any* defendants can cause one or more of the injuries or diseases from which the veterans suffer. Contrary to *any* **[6]** assertion which has been made or might be made by *any* defendant in this regard, the basic scientific fact is there is no safe level of dioxin. Indeed, no safe level has or can be established at this time for any substance which can cause carcinogenic and/or genetic effects and/or other chronic manifestations. The scientific evidence in respect of all this to be presented on behalf of the plaintiffs will be quite clear.

The second such component is the effect of the provable exposure to dioxin by the veterans. More precisely, the entire spectrum of harmful effects (Exhibit "A") will require substantial medical evidence.

The evidence establishing exposure and adverse effects, coupled with such positive associations resulting from toxicological and/or epidemiological studies, demonstrates therefore the quintessential character of "Generic Causation" association in the specific area of dioxin-related injury.

After much study of dioxin and its multitude of adverse health effects, it has been clearly established that dioxin-related injury is a cumulative process, i.e. the higher the level and/or the longer a veteran was exposed, the earlier and/or

greater the chances of the manifestation of adverse health effects. However, as noted above, any level of dioxin is potentially harmful; higher levels result in a higher probability of harm. That is to say, since dioxin contamination to which a veteran was exposed may be harmful to human health, *all* of the phenoxy herbicides manufactured and sold by *any* of the defendants are responsible in some undefined part. This, therefore, triggers the concept of joint and several liability of *all* of the defendants who manufactured -- and sold phenoxy herbicides, including Agent Orange, to the United States for use in Vietnam during the period 1962-1971.

* * * *

[56] 48. State whether you knew health hazards, physical disorders, injuries, irritations or diseases were associated with exposure to, or use of, phenoxy herbicides, including but limited to the industrial synthesis (during and after) of 2, 4, 5-T. If your answer is affirmative, state or identify:

(a) the date you acquired such knowledge;

(b) the manner in which you gained such knowledge; (c) the type of health hazards, physical disorders,

injuries, irritations or diseases, including but not limited to:

chloracne; porphyria cutanea tarda; hyperpigmentation; hyper-keratosis; hirsutism; asthenia; weakness in lower extremities; loss of strength; easy fatigability; fatigue; headaches; peripheral neuropathy; polyneuropathy; intolerance to cold; other neurological deficits; irritation to eyes; impairment of sight; impairment of hearing; impairment of smell; impairment of taste; loss of weight; loss of appetite; anorexia; loss of sexual drive; sleep disturbances; orthostatic hypotension; abdominal pain; nausea; vomiting; diarrhea; other gastrointestinal disorders; neurasthenia; depression; violent behavior; other psychobehavioral disorders; myocardial infarction; atherosclerosis; other

cardiovascular disorders; liver damage; pancreatic dysfunction; kidney disorders; urinary tract disorders; pulmonary pathologies; other respiratory disorders; fat metabolism disorders; carbohydrate metabolism disorders; cholangiocarcinoma; other liver cancers; kidney cancer; bladder cancer; pancreatic cancer; colon cancer; stomach cancer; other gastrointestinal cancers; lung cancer; fibrosarcoma; leiomyosarcoma; liposarcoma; rhabomyosarcoma; myofibrosarcoma; neurofibrosarcoma; fibrous histiocytoma; retroperitoneal neurogenic sarcoma; fibrosarcomatous mesothelioma; other soft-tissue sarcomas; leukemia; angiosarcoma; other blood cancers; hepatoma; lymphoma; squamous cell carcinoma of skin; other skin cancers; thyroid cancer; other glandular cancers; cancer of tongue; cancer of hard palate; other cancers of mouth; and

(d) all documents and communications which refer, reflect, relate to, or embody the information sought by this interrogatory.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

United States Courthouse
Brooklyn, New York

December 12, 1983
1:00 p.m.

Before:
HONORABLE JACK B. WEINSTEIN, Chief U.S.D.J.

[Transcript Excerpts]

* * * *

[20] supplement. That is true of all these interrogatories where you have no complete information.

Interrogatory 8, the same ruling; the Master's ruling is confirmed.

Interrogatory #9, no objection.

Interrogatory 10 --

MR. DEAN: As to #10, we were fighting to get the information. We don't have it yet.

THE COURT: I can tell you what you're going to face.

I will not expand discovery beyond what the Master has permitted. As you see from the proposed class action definition, I am going to let you prove anything that you want. I am going to open this case wide open, because I don't want to retry it.

Based on the little I know, if you start expanding this case beyond dioxin, it's a suicidal matter; because no jury is

going to understand it, and you're going to lose everything. If that's what you want to do, it's okay with me.

The one thing I don't want is to finish this case -- assuming it can be finished -- and then have somebody else step in with another class action on some different herbicide or some slightly different theory.

If and when we close this case, I want it completely closed on everything. So, whatever the Master ruled **[21]** on the discovery -- we'll hear discussion on -- but it's a discovery motion; not a motion to prevent you from trying it, if that is what you want to do.

MR. DEAN: The motion to which this question -- this interrogatory may refer is a pending motion which has been pending for some months; the subject matter of which -- for example-- our right to Dow Workmen's Compensation records -- and a number of briefs have been submitted on both sides --

THE SPECIAL MASTER: It's only up in the air because counsel tell me they resolved the problem.

If they want a ruling, I'll be happy to give it within 48 hours.

MR. DEAN: The problem is not resolved, nor have I made the representation it is --

THE COURT: You want Workmen's Compensation records on what?

MR. DEAN: All exposure claims filed by Dow. Diamond Shamrock has given us the records with the names. Monsanto has given us their records, period.

Dow refuses to release the records, claiming --

THE COURT: What period --

MR. DEAN: -- Michigan law prevents them from doing it. We do intend to use, as noticed, certain prior industrial claims. We don't have all of them.

[56] close up loose ends like this.

I think the Clerk's entry of a judgment is sufficient here.

Is there anything else on page three?

Page four?

MR. GORDON: On page four, your Honor, there is a deletion, which I am sure is deliberate, which I would like to discuss, that was paragraph four of defendant's proposed notice, which was the provision for identifying representative plaintiffs and also stating the nature of their claims, and that there had been no determination as to the adequacy or typicality.

We are quite concerned that the Court can issue a classification order, and authorize the notice where as yet, there has been no determination as to adequacy or typicality, and in fact, as of today, we have not obtained a list of the full represented plaintiffs in the class.

I don't think the Court can do that. If the Court is going to insist on certifying a notice before that is done, I think that there --

SPECIAL MASTER: Excuse me, your Honor?

MR. GORDON: It's an important provision which is not incorporated.

SPECIAL MASTER: Your Honor, it is assumed that this order will not go out until (b) (3) is filed with the Court.

[57] THE COURT: Until what?

SPECIAL MASTER: Until your opinion finding (b)(3) your Honor.

THE COURT: The position of the defendants is that I have not really had the information necessary to make that determination.

Isn't that it?

MR. GORDON: That's absolutely correct, and let me give you an example, your Honor.

In the first five names we have received from the plaintiff, I believe there were three cancer cases. I am not familiar with the other two claims.

But at various times, plaintiffs have claimed a wide range of injuries, such as porphyria, cutanea and tarda, various other liver illnesses, heart problems, impotence, a whole plethora of ailments.

And if there are no representative plaintiffs with that particular ailment, they cannot represent a class member who had that ailment, who believes it was caused by Agent Orange.

This is an important problem, and I believe we should ascertain a full profile of each of the representative claimants, and find out if there are complaints outstanding, or which indicates there is an area not being represented.

[58] And I think that should be disclosed to the class notice.

MR. DEAN: Your Honor, adequacy and typicality has been decided in September of 1980, as well as by your Honor. Those are precedents before class certification under (b) (3) or (b) (1) (a) or (b) (1) (b).

Those four elements, of which adequacy and typicality are included, must be resolved in favor of the petitioning parties, before your Honor makes a determination with regard to the type of class that it is.

So we say when Mr. -- when the lawyer from Diamond Shamrock indicates that adequacy and typicality must be the test for the representative claimant, I am not persuaded it is right, and I don't believe that is the law.

MR. GORDON: I would further point back to Judge Pratt's original decision, where he indicated his intention to certify the (b) (3) class. He indicated at some point in the future, a formal complaint would be served which listed the representatives of the plaintiffs.

And I might add, at this point, there is no class complaint as that term is usually understood in this litigation.

There is no action which we are proceeding in right

* * * *

[61] defects are not caused. And if they come in with a fetal defect representative plaintiff, and there's a finding against that, there has to be some inquiries and a lot interrogatories, I believe, and then there will be no fetal defect cases in the class.

I take it that the typical claims they have selected include the relatively modest claims, ranging to the very severe.

MR. PAKULA: That's not correct, your Honor.

MR. DEAN: There are no relatively modest claims, but there are claims of basic chloracne, and from that, claims involving cancer deaths and children with birth defects.

MR. KROHLEY: I received a list of 11 so-called representative plaintiffs a few minutes ago, and from my quick count, five have cancers.

By this, I don't think the plaintiffs wish to say that fifty percent or so of the entire class suffers from some form of cancer.

THE COURT: If they don't put in a claim, let's assume the claim is for tingling fingers --

MR. KROHLEY: There are tingling claims in here, your Honor.

THE COURT: Then tingling claims are out.

MR. KROHLEY: I agree with what your Honor said.

[62] But I think the more fundamental point here is that we are misleading the trier of fact. I think we are misleading a jury.

If the jury thinks that these ten people or eleven people have representative illnesses, and they get the impression that

fifty percent have some form of cancer, I think there is a gross misrepresentation of the plaintiffs' class.

THE COURT: I will explain that, and I am sure you will.

Alan, make a note of this.

I want to give the jury a preliminary charge. I will put that in the preliminary charge, and you can make the point to them. I don't see how we can avoid that problem.

MR. KROHLEY: I think the problem has been created where we are calling representatives people as to whom no determination has been made, as to whether they are representatives.

That's not in terms of what they have, but in terms of their exposures, or length of exposures, and whatever possibilities in the world there are, for causing these illnesses.

THE COURT: I will look through what they have in the trial.

* * * *

[65] a class.

Are they representative or just 11 people --

THE COURT: You will go through it and I will hear you further on. It may well be that they do not have a class. I do not know what they have.

MR. GORDON: It's fine to use a charge to indicate to the jury that the ten claims in front of them are not representative of the entire class --

THE COURT: I am not --

MR. GORDON: Shouldn't something be done before a class notification goes out to 120,000 people on the Agent Orange registry, before you broadcast the case to the 50 states, Australia and New Zealand, when half will not be part of the class at all?

MR. DEAN: How is that, that half may not be part of the class? We have anguished over the selection of the names. We are aware it is a two-edged sword. We are very aware of that. When the defendants say, "We'd like to select your plaintiffs," we have a little difficulty respectfully.

THE COURT: We have a problem here. I understand that both sides have a problem. The Court has a problem. We have an enormous case where we have to come to grips with it. This is the way I have decided that we should do it and this is the way we are going to do it.

[66] As we proceed, if there are special problems with particular plaintiffs you will bring them to my attention. That is one of the reasons I was anxious to get the names and the information to you as quickly as we can. We'll be meeting regularly and I will be happy to hear you on any problem and further limitation on the class --

MR. KROHLEY: The thing -- the practical problem that we have here -- and I know it is something that your Honor will not consider. We do not have the time between now and May to do what I am suggesting.

However, what I am suggesting is that I think it is not even a close case. There is no way that this case should proceed as a class action untii the determinations have been made that there are representative plaintiffs. It is the reason why mass tort litigation proceeds as a class --

THE COURT: I do not know the profile of these people yet. Maybe you do, but I do not. When you get something on them, we will sit down and go through them and see how they fit in.

MR. KROHLEY: I will make an effort to do that in the next week. May I ask the Court to hold off on certifying this class for one week?

THE COURT: I have to move ahead on this. This certification has been kicking over for too long.

[67] MR. GORDON: May I raise another problem concerning the advocacy of representatives. In the event we send out the notice and move along, a month or two months from now, and it turns out that the representative plaintiffs are not representative of very many people, we will proceed to trial and the class will be changed. It will concern only cancer cases or whatever. The class will be decertified as to other claimants. The people have already received the notice will not know what has happened. They will continue to rely on the class action that does not include them anymore, while the statute of limitation will begin to toll -- toll and will expire. There is a very serious danger to prejudice those who are later cut of the class, because we have not made this determination --

THE COURT: That is the nature of life. We proceed as best we can with the information available and then we modify our decision. We try to take care of these problems. We are trying to get the names and addresses of these people, to give them to the extent that we can. We will do the best we can, but in the meantime, life is moving on. The veterans are dying, not necessarily because of Agent Orange. I am not saying that that is the reason. We cannot wait indefinitely.

* * * *

[71] that it does any good, really.

If it comes to the Clerk, the Clerk will have to forward them. There is no problem.

Page 8, no more problems.

Page 9, any problems?

Page 10, any problems?

The exclusion request form. I have added that information on the bottom, which seems to me will be helpful in fixing who these people are, but I do not know whether the form of it --

MR. DEAN: We have no objection to it.

MR. GORDON: Could I raise at this point a problem which has been briefed several times and still continues to trouble me, and that is the class definition in terms of claiming injury.

The problem there is no objective standard to determine whether or not anyone that received the notice in effect claiming an injury and the concern that I have if defendants are successful at trial, and then claims begin pouring in that are in the class, who are sick at the time of the trial, but they say, "I wasn't claiming injury at that time relating to Agent Orange exposure" --

THE COURT: I am not sure that I understand. Say that again? I did not follow you.

[72] MR. GORDON: If defendants are successful at trial, representative of plaintiff claims are dismissed, following that there are additional claims made by class members who received a notice, did not opt out, but when a challenge is made by defendants --

THE COURT: I see.

MR. GORDON: -- they say, "I was no" --

THE COURT: How would you suggest that we reframe it?

MR. GORDON: It's difficult, because it was one of the main reasons that the defendants opposed classification, and may be focusing your attention on it now, that we might come up with a solution to this problem. Claiming injury is not an objective standard.

THE COURT: We can say, "You are injured as a result of" --

MR. GORDON: I do not think we can say that.

MR. KROHLEY: So do I.

MR. GORDON: It's the defendant's position that no one was injured by Agent Orange.

MR. DEAN: Of course.

THE COURT: That is why we put it in. If you want that protection, it would say "Who are injured" --

MR. GORDON: I believe in the original proposal, a group that believes they may be related --

* * * *

[73] THE COURT: That does not solve your problem. At the time they don't believe it. Later on they believe it. If you want it protected, it should be who are injured.

MR. GORDON: I do not want that. I will think about it in the next day or so, and perhaps the Court will also.

THE COURT: I will give it some thought, but you had better get to me quickly, because I plan to issue something, if I can get a typist. I use words, "Armed Forces Identification Number."

My number used to be a serial number. Is that what it is for all the Armed Forces?

THE SPECIAL MASTER: Yes.

MR. MATTHEWS: If I may, they had a serial number that was in effect until somewhere around 1968. Then your Social Security number became your serial number.

THE COURT: I had better write "identifying number."

MR. MATTHEWS: I think so.

THE-COURT: I was not sure what they did.

MR. PAKULA: One addendum, to make sure that the record is clear, and to Subparagraph H of the order itself, Page 7, I just would like the record to be clear that the defendant's position on that was that the plaintiff should at their expense have to obtain

* * * *

[75] THE COURT: As I explained to you, my position on that is: That I do not want -- should this action ever be terminated -- some other plaintiff's attorneys to come in with a new class of these injured by herbicides, other than Agent

Orange, and if I limit the class as you suggest that is just what is going to happen. On the hypothetical that this case is settled, X millions of dollars, the day after it is settled there will be 38 attorneys -- at least -- throughout the country who will jump in with a new class action covering those injured by herbicides, not Agent Orange and they will therefore be able to boost the settlement X plus A. I do not want that, if I can avoid it. That is the reason I did it.

MS. MINTZER: I understand that, your Honor. The problem for the defendants are that we have been discovering and preparing our defense with regard to 2,4,5-T, 2378-TCDD --

THE COURT: And that is what you will face at the trial, because if the plaintiffs get involved in all these other things, they are going to succeed only in getting nothing. They have to really try this case on the theory that they suggested, that dioxin is terribly poison. If they get involved in all kinds of trivial discomforts, tingling at their fingerends,

* * * *

[111] Agent Orange.

MR. GOLDSTEIN: I think what I just laid out would be an argument that focuses on 2,4-D, albeit, as a part of Agent Orange --

THE COURT: I cannot be more specific at this stage. We all understand that if the plaintiff attempted to comment at the trial on 2,4-D and shift their grounds from what it has been, as I understand it up to now -- first of all, no Brooklyn jury is going to go along with them. We have very tough jurors. If the Brooklyn jury does go along, I will not go along. We have a practical matter. They are committed to Agent Orange practically. How they want to deal with the problem, I do not know. Apparently, they are getting some information from some expert that makes them nervous. I can't look into their minds and I have no desire to do so, even if I had the ability.

MR. GORDON: Your Honor, a couple of points --

THE COURT: The order is going out as is.

MR. GORDON: -- with respect to the class --

THE COURT: The class action order is going out as is.

MR. GORDON: That is one of my points. I think the definition of the herbicides in question needs to be adjusted in view of --

[112] THE COURT: I am not going to adjust it. I told you the reason why. I am not going to adjust it, because I do not want this case terminated and then 24 hours later somebody walks in with a complaint that takes care of a class that is not covered by this class action. I want the class action definition subject to subsequent discussions -- as broad as possible, so that we try one Vietnam case and that is it -- and we can try it. That is why I am doing it. If you want to submit any brief on the point, I will be glad to hear it. At this point I do not think argument will help us very much.

MR. GORDON: I want to make sure that you are clear on that.

We have not gotten to the radio and television announcements --

THE COURT: I will be happy to hear you.

MR. GORDON: First, the defendants have suggested that the announcements -- in addition to mentioning Agent Orange -- mention 2, 4, 5-T and dioxin. The reason we did that was because --

THE COURT: How do you want it?

That was put in at your request. What do you want to do with it?

MR. GORDON: Exhibit B --

STIPULATION OF SETTLEMENT IN IN RE "AGENT ORANGE" PRODUCT LITIGATION, M.D.L. 381

It is hereby stipulated and agreed that:

1. Defendants as a group will pay $180 million, plus interest, to the class in a manner ordered by the court. Interest is to accrue at the prime rate from May 7, 1984.

2. Defendants will advance out of this fund expenses on account of notice and settlement administration (but not to include attorneys' fees or attorneys' expenses).

3. No other distribution will be made from the settlement fund until after an order approving settlement has become final, including appeals.

4. The settlement fund will indemnify defendants for any final judgment, excluding defendants' costs and fees rendered against them in "Agent Orange" suits by service persons in state court. The indemnification shall be for final judgments rendered against any or all defendants up to an aggregate of $10 million on all such final judgments. The court may allow additional payments after January 1, 1990 if the payments to members of the class are assured.

5. The class definition as interpreted will specifically include these service persons who have not yet manifested injury.

6. If plaintiffs pursue claims against the United States within one year, they may retain documents until after any case or cases have been concluded.

7. Plaintiffs and defendants reserve all rights and claims against the United States and any persons not be a party to this class action.

8. Defendants deny any liability.

9. Defendants reserve the right to reject this settlement if they feel that the number of opt-outs is substantial. This right must be exercised no later than 10 days before the public hearing on Rule 23(e).

10. Any class member who has opted out shall have the opportunity to opt back in within a reasonable time as determined by the court.

11. Any party may apply for disposition of the renaining funds on order of the court after twenty-five years.

12. This agreement is subject to Rule 23(e) of the Federal Rules of Civil Procedure.

13. Arrangements will be made from the fund to assist afterborns.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re	:	MDL No. 381
"AGENT ORANGE"	:	
Product Liability Litigation	:	
MICHAEL F. RYAN, et al.,	:	
Plaintiffs,	:	
-- against --	:	79 C 747
DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL, INC., and THOMPSON CHEMICALS CORPORATION,	:	SETTLEMENT AGREEMENT
Defendants.	:	

The parties to the above-entitled action, by and through their attorneys, propose the following Settlement Agreement (the "Agreement") for the Court's approval.

WHEREAS, the above-entitled action has been brought by the plaintiffs as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of themselves and all other persons similarly situated: and

WHEREAS, the Court. has, by order dated December 16, 1983, certified this action as a class action, and defined a class (the "Class"), under Rules 23 (b) (3) and 23 (b) (1) (B) of the Federal Rules of Civil Procedure; and

WHEREAS, the attorneys for the Class represent that notice to the members of the Class has been provided substantially as required by that order; and

WHEREAS, the Seventh Amended Complaint and all predecessor complaints (the "Complaint") assert certain claims against the defendants for injuries allegedly resulting from exposure to phenoxy herbicides composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid, to wit, Agent Orange, Agent Orange II, Agent Purple, Agent Pink and Agent Green (hereinafter collectively referred to as "Agent Orange"), which were manufactured for or sold to the United States by various defendants for use in Vietnam; and

WHEREAS, all of the defendants have been served or have appeared and have filed answers or are deemed to have answered and denied all of the material allegations of the Complaint, and have asserted affirmative defenses that the claims are without merit and are barred in whole or in part; and

WHEREAS, the attorneys for the Class have conducted a thorough study and investigation of the facts and the law relating to the matters set forth in the Complaint, and have conducted extensive pretrial discovery proceedings, including oral depositions of numerous of the defendants' present and former employees and of present and former government employees, and have examined and analyzed voluminous documentation relating to the subject matter of the Complaint; and

WHEREAS, the defendants deny and disclaim any liability or wrongdoing whatsoever and believe that this action is without merit; and

WHEREAS, the attorneys for the Class have agreed to settle the claims alleged in this action pursuant to the terms

and provisions of this Agreement after taking into account the substantial benefits that the members of the Class will receive as a result of the settlement, the expense, burdens, and diversion of protracted litigation, including lengthy appeals, the risk of not prevailing at trial, and the conclusion reached by the attorneys for the Class that the settlement is fair, reasonable and adequate and in the best interests of the Class; and

WHEREAS, the defendants desire to avoid the expense, burdens and diversion of protracted litigation, including lengthy appeals, the risk of not prevailing at trial, and desire to put at rest all controversy between the plaintiff Class and defendants, and their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees, and agents, and desire to settle, compromise and terminate this action, all claims asserted, and all other claims by any member of the Class hereafter arising against the defendants that are, or could in the future be, based on or arise out of any of the', matters alleged in the Complaint; and

WHEREAS, all parties to this Agreement desire and intend that the comprehensive settlement and compromise provided for herein shall extend to and include all claims alleged in the Complaint and all cross-claims alleged in this action (but excluding all claims against the United States) , and that this action shall be dismissed with prejudice and without costs to any party,

NOW, THEREZORE, IT IS HERESY AGREED, by and among the undersigned as of May 7, 1984, that this action shall be compromised and settled, subject to the approval of the Court, upon and subject to the following terms and conditions:

1. Subject to all of the conditions contained in this Agreement, defendants will pay or cause to be paid on their behalf one hundred eighty million dollars ($180,000,000.00) (the "Settlement Amount") in full and final settlement of all

claims for compensatory damages against them, and their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees and agents, that arise out of or are based on, or could in the future arise out of or be based on, any of the matters alleged in the Complaint. The unpaid amount of the Settlement Amount shall bear simple interest at the Average Prime Rate (hereinafter defined) from May 7, 1984 through the date of payment. At the time any part of the Settlement$_s$ Amount is paid, accrued interest shall be payable on that part. "Average Prime Rate" shall mean the sum of the publicly announced prime commercial lending rates of The Bank of New York on the last business day of each month that payments hereunder have been outstanding, divided by the number of months that the payment(s) have been outstanding. All calculations shall be based on a 360-day year. Payment of the Settlement Amount with interest accrued thereon shall be made by defendants within 10 days after an order approving this Agreement has been signed by the Court; provided, however, that any defendant may, at its option, pay any or all of its share of the Settlement Amount with interest accrued thereon in advance of the foregoing date. All amounts paid by defendants shall be paid into a fund (the "Fund") to be established, maintained and administered by the Court. No distribution to Class members, or payment of attorneys' fees or out-of-pocket disbursements, is authorized until after an order approving this Agreement has become final and all appeals and requests for review have been decided.

2. The agreement by the defendants to pay the Settlement Amount with interest accrued thereon is not intended to and shall not be deemed to create a joint or joint and several obligation on the part of the defendants. Each defendant shall be obligated solely to pay that portion, with interest, of the Settlement Amount set forth in a sealed agreement delivered to the Honorable Jack B. Weinstein, Chief Judge, United States District Court for the Eastern

District of New York, on May 7, 1984. Failure of any defendant to fulfill its obligations as set forth in said agreement or to abide by any term or condition of this Agreement shall not abrogate this Agreement as to any other defendant or increase any obligation of any other defendant under this Agreement. Each defendant shall provide financial security for its payment in a form acceptable to the Court after consultation with the parties.

3. Defendants will advance sums in amounts to be set from time to time by the Court, in proportion to their contributions to the Settlement Amount, solely for the preparation and dissemination of notice of the settlement and for incidental administration expenses as approved by the Court. The Settlement Amount shall be reduced by the amount of advanced sums. If for any reason this Agreement is not approved or does not become effective, the unused portion of the advanced sums and all interest accrued thereon shall be returned to defendants forthwith in proportion to their contributions to the Settlement Amount, and all expenses paid from sums advanced by defendants shall be divided and assessed as determined by the Court.

4. The Fund shall be maintained and administered by the Court and shall be under the Court's continuous jurisdiction, control and supervision to assure that the Fund shall earn the maximum interest consistent with safety and that all disbursements are properly made. The Court may, with or without consulting the parties, appoint and remove, with or without cause, auditors, special masters, disbursing agents, consultants, counsel or others and enter into appropriate contracts or authorize its agents or special masters to do so. The expenses of persons appointed by the Court shall be payable out of the Fund in accordance with Court order. All expenses of administering the Fund, including the cost of preparing and disseminating notice of settlement to the Class and of validating and determining claims, shall be paid from the Fund. All interest and earnings of the Fund shall accumulate and become part of the Fund. After 25 years from

the date of this Agreement, any balance remaining in the Fund shall be disposed of in such manner as the Court may direct. Except as specifically set forth in this Agreement, 'defendants shall have no responsibility or obligation with respect to the Fund or distributions therefrom.

5. Defendants and their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees and agents, are not, and in the future shall not be, subject to liability or expense of any kind to any member of the Class in respect of any claim arising out of the subject matter of the Complaint, except as to their obligations to make payments pursuant to this Agreement. Claims against the Fund shall be the exclusive remedy of all Class members against the defendants or any of their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees and agents, and all members of the Class are forever barred from instituting or maintaining any action against any of the defendants, or any of their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates or insurers, as well as any of their stockholders, directors, officers, employees and agents, arising out of or relating to, or in the future arising out of or relating to, the subject matter of the Complaint.

6. The Fund shall indemnify all defendants, and their foreign or domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees and agents, for all final compensatory judgments (excluding settlements), exclusive of costs and attorneys' fees, rendered against any of them in all state-court actions alleging harm caused by exposure to Agent Orange in or near Vietnam, not to exceed an aggregate amount of $10 million. The Court may, however, allow additional payments of indemnification after January 1, 1990, if, in the Court's discretion, payments to members of the Class are assured.

7. In the distribution of the Fund arrangements will be made to assist children born on or after January l, 1984. Such afterborn children by whom or on whose behalf an election is made to receive benefits from the Fund shall be subject to the terms and conditions of paragraph 5 hereof as if members of the Class.

8. The Class specifically includes persons who have not yet manifested injury. All persons who are otherwise qualified but who previously requested exclusion from the Class shall have the opportunity to withdraw their exclusion within a reasonable time as determined by the Court, and shall thereby be included in the Class.

9. Any defendant shall have the right to withdraw from this Agreement if it believes in its discretion that the number of persons who have elected to be excluded from the Class is substantial. Any defendant may exercise that right no later than 20 days before-the date for the first public hearing scheduled in accordance with Rule 23(e) of the Federal Rules of Civil Procedure to consider approval of the settlement of this action. If any defendant withdraws from this Agreement pursuant to this paragraph, the Agreement shall remain in full force and effect as to the plaintiff Class and as to the remaining defendants in accordance with their proportionate shares of the Settlement Amount.

10. Neither this Agreement nor any proceeding taken hereunder shall be construed as or deemed to be evidence or an admission or concession by any defendant of any liability or wrongdoing whatsoever, which is expressly denied by each defendant, or on the part of the plaintiffs of any lack of merit in their claims. None of the provisions of this Agreement, nor evidence of any negotiations or proceedings in pursuance of the compromise and settlement herein, shall be offered or received in evidence in this action or any other action or proceeding as an admission or concession of liability or wrongdoing of any nature on the part of any of the defendants, or for any other purpose whatsoever (including,

without limitation, to establish jurisdiction, venue or waiver of any affirmative defense), except to enforce the terms and provisions hereof.

11. The plaintiffs and defendants expressly reserve all rights and claims which they now have, or may at any time be entitled to assert against the United States, including its offices, departments, agencies, representatives, agents and employees. Plaintiffs further reserve all such rights and claims against every person (a) not a party to this action, and (b) not a foreign or domestic predecessor, successor, parent, subsidiary, affiliate, insurer, stockholder, director, officer, employee or agent of a defendant. Each defendant further reserves all such rights and claims against every person (a) not presently a party to this action, and (b) not a foreign or domestic predecessor, successor, parent, subsidiary, affiliate, insurer, stockholder, director, officer, employee or agent of another present defendant.

12. The attorneys for the Class shall return to each defendant, respectively, all documents in their possession or control produced by that defendant, including microfilm and all copies, within 30 days after final judgment is entered in this action and is no longer subject to appeal or review, or if plaintiffs pursue claims against the United States within one year after the date of this Agreement, within 30 days after final adjudication of those claims, whichever is later.

13. The settlement of this action shall become effective only when the judgment contemplated by this Agreement dismissing with prejudice and without costs both plaintiffs' claims, including claims for punitive damages, and defendants' cross-claims becomes final and is no longer subject to appeal or review.

14. Any award of plaintiffs' attorneys' fees and necessary out-of-pocket disbursements incurred by them in the prosecution and settlement of this action shall be payable exclusively from the Fund, and defendants shall not be liable for any such payment.

15. All of the undersigned attorneys severally represent that they have been duly authorized to enter into this Agreement.

16. This Agreement will be null and void unless the Court expressly approves it pursuant to Rule 23(e) of the Federal Rules of Civil Procedure as a fair, reasonable and adequate settlement of this action.

17. In the event this Agreement is not approved by the Court, or does *not* become effective for any reason, then this Agreement shall be null and-void for all purposes and of no further force and effect, subject to the provisions of paragraphs 3 and 10 hereof, and all sums remaining in the Fund shall be repaid to the defendants forthwith, together with all interest thereon, in accordance with their prior contributions to the Fund.

18. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

19. The Court shall retain jurisdiction over the Fund pending its final disposition.

Dated:

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By:
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE"
Product Liability Litigation

MDL No. 381

MICHAEL F. RYAN, *et al.*,
Plaintiffs,
against

DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, T H AGRICULTURE & NUTRITION COMPANY, INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL, INC., and THOMSPON CHEMICALS CORPORATION,
Defendants.

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79 C 747

NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION AND CLAIM FORM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re	:	MDL No. 381
"AGENT ORANGE"	:	
Product Liability Litigation	:	

MICHAEL F. RYAN, *et al.*,

Plaintiffs,

-- against --

DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, T H AGRICULTURE & NUTRITION COMPANY, INC., INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL, INC., and THOMPSON CHEMICALS CORPORATION,

Defendants.

79 C 747

NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION

YOU ARE HEREBY NOTIFIED OF A PROPOSED SETTLEMENT OF THIS CLASS ACTION, OF HEARINGS TO BE HELD BY THE COURT TO DETERMINE WHETHER IT SHOULD BE APPROVED, AND OF WHAT YOU MUST DO NOW IF YOU BELIEVE YOU HAVE A CLAIM FOR ADVERSE HEALTH EFFECTS ALLEGEDLY RELATED TO AGENT ORANGE EXPOSURE IN OR NEAR VIETNAM.

1. The Class.

This Court has previously certified a plaintiff class consisting of those persons who were in the United States, New Zealand or Australian Armed Forces at any time from

1961 to 1972 who were injured while in or near Vietnam by exposure to "Agent Orange" or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin (collectively referred to as "Agent Orange"). The class also includes spouses, parents, and children born before January 1, 1984, directly or derivatively injured as a result of the exposure.

On or about March 9, 1984, notice was given to advise class members of the certification of a class under Rule 23(b)(3) and of their right to request exclusion from the class. All persons who did not request exclusion on or before May 1, 1984, as provided in that notice, are members of the class for the purposes of the proposed Settlement if they fall within the above class definition. Those persons who requested exclusion are being sent a separate notice, pursuant to which they may withdraw such requests and become eligible to participate in the proposed Settlement if it is approved by the Court.

2. The Litigation And The Proposed Settlement.

This litigation was brought on behalf of the above defined class against seven chemical company defendants, Dow Chemical Company, Monsanto Company, T H Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc., Hercules Incorporated and Thompson Chemicals Corporation. The plaintiff class representatives (as appointed by the Court) have sought recovery for various injuries claimed to have resulted from exposure to Agent Orange in or near Vietnam, including among others, various health-related effects upon servicepersons, birth defects to their children and miscarriages by their wives. Defendants denied and continued to deny any liability or wrongdoing.

The attorneys for the class representatives and the attorneys for all of the defendants have entered into a Settlement Agreement, made as of May 7, 1984, which is

subject to and conditioned upon the Court's approval of its terms. Under the Settlement, if it is approved, the defendants collectively will pay One Hundred Eighty Million Dollars ($180,000,000), plus interest at the average prime rate from May 7, 1984 to the date of payment, into a Settlement Fund ("the Fund") to be established and supervised by the Court for the payment of class members' claims.

A copy of the Settlement Agreement is attached hereto. Although a summary of its principal terms follows, you should examine the Agreement itself. Nothing in this Notice shall be construed to alter the terms of that Agreement.

If the Settlement is approved by the Court, the defendants' payments into the Fund will dispose of all claims against them asserted in this litigation or arising out of or based upon the matters alleged in this litigation. The defendants will also be entitled to an indemnity out of the Fund up to the total amount of $10 million for judgments that might be rendered against them in certain state-court cases also involving alleged Agent Orange injuries. The Court may allow additional payments of indemnification after January 1, 1990 if, in the Court's discretion, payments to the members of the class are assured.

All payments by the defendants will be made no later than ten days after an order approving the Settlement Agreement has been signed by the Court. The Settlement Agreement allows any defendant to withdraw from the Settlement up to 20 days prior to the Court's first hearing to consider approval of the Settlement in the event it determines that the number of persons who have elected to be excluded from the class is substantial.

The Settlement Agreement confirms that the class includes persons who have not yet manifested injury.

The Settlement Agreement also provides that persons who have previously requested exclusion from the class on or before May 1, 1984 may participate in the Settlement by withdrawing their exclusions.

The Settlement Agreement further provides that arrangements will be made to assist afterborn children from the Fund.

Both the plaintiffs and the defendants reserve all of their rights to make claims against the United States Government and any person or company that is not a defendant or a predecessor, successor, parent, subsidiary, affiliate or insurer of a defendant.

The plaintiff class representatives and their counsel have concluded, after taking into account the many sharply contested issues involved, the risks and costs attending further prosecution of this litigation, and the benefits to be received pursuant to the proposed Settlement, that settlement of this litigation upon the terms provided in the Settlement Agreement will be in the best interests of the class.

3. Hearings To Consider Approval Of The Settlement Agreement.

The Settlement Agreement will not become effective unless and until the Court decides that it should be approved as a fair, reasonable and adequate compromise of the aggregate claims of the plaintiff class as a whole. In order to assist the Court in making this decision, the Court will hold hearings ("the fairness hearings") in five cities in various parts of the United States during the month of August, 1984, at the times and places set forth at the end of this Notice. Following those hearings, the Court will determine whether the proposed Settlement, the principal terms of which are described above, should be approved. THE ONLY QUESTION TO BE DECIDED AT THIS TIME IS WHETHER THIS SETTLEMENT AS A WHOLE IS FAIR, REASONABLE AND ADEQUATE.

All written objections to the Settlement should be submitted to the Clerk in writing by July 30, 1984, at the address given at the end of this Notice. Class members or their representatives may appear at any of the hearings and any objections they have will be heard by the Court. Any person

who wishes to be heard should notify the Clerk on or before July 30, 1984, at the address given at the end of this Notice, stating the amount of time he or she requests.

If the Court approves the proposed Settlement, it will subsequently conduct further proceedings with respect to the question of allocation and distribution of the Settlement Fund to qualifying class members in satisfaction of their claims for injuries allegedly related to Agent Orange exposure in or near Vietnam.

The Court recognizes that the question of allocation and distribution of the Settlement Fund to class members involves complex issues that will require extensive further study, as well as input from Vietnam veterans, and therefore will not make any decision on this question at the present stage of the proceedings. The Court does, however, actively solicit and encourage and will consider recommendations and suggestions on this question from any party to the litigation, Vietnam veterans and other interested persons. Any such recommendations and suggestions may be submitted in writing at the address given at the end of this Notice, and will be subject to preliminary oral discussion at the hearings scheduled by this Notice.

The Court is deferring for future consideration the question of fees and expenses to be awarded to plaintiffs' counsel from the Fund. The Court has determined that Rule 5 of the U.S. District Court for the Southern and Eastern Districts of New York should not be applied in this litigation because of the need for continued intensive work by the attorneys until the close of the fairness hearings and because of the complexity of the fee applications. *Cf. In Re "Agent Orange" Product Liability Litigation*, MDL No. 381, P.T.O. 90, 100 F.R.D. 778, 780 (E.D.N.Y. 1984) (discretion under local Rules). All applications for such awards of attorneys' fees and expenses through the completion of the fairness hearings will be filed with the Clerk no later than August 31, 1984, and will be available for inspection in the Clerk's Office,

United States Courthouse, 225 Cadman Plaza East, Brooklyn, N.Y. 11201 during business hours. The Court will hold a hearing on September 24 and 25, 1984 at the Courthouse in Brooklyn at which class members will be given an opportunity to raise any objections they might have to such applications for fees and expenses.

4. What You Must Do If You Believe You Have Adverse Health Effects Related To Agent Orange Exposure In Or Near Vietnam And Wish To Make A Claim For Such Effects.

THE SETTLEMENT FUND WILL BE UTILIZED TO COMPENSATE CLASS MEMBERS FOR CERTAIN ADVERSE HEALTH EFFECTS ALLEGED TO BE RELATED TO AGENT ORANGE EXPOSURE. If the Settlement is approved, a proposed plan for the allocation and distribution of the Settlement Fund to class members will be developed and considered by the Court in subsequent proceedings. The following is a brief outline of the basic elements of the plan that the class representatives, have indicated that they expect to propose to the Court:

A. A portion of the Fund -- in an amount to be determined after the claims of class members have been formally submitted -- will be allocated and distributed to class members who suffer from presently manifested adverse health effects. It is not possible for all class members, regardless of the nature and/or degree of injury, to receive compensation. Accordingly, compensation under the Fund may be limited to designated kinds of adverse health effects and degrees of disability -- as yet to be determined -- which will be defined in the plan. In addition, in order to assure that the Fund will not be exhausted before all potential claims for unmanifested adverse health effects are processed, it may prove necessary to adjust the compensation for presently

manifested health effects so that funds are available for class members who may manifest compensable effects in the future.

B. A portion of the Fund -- in an amount yet to be determined -- will be set aside for future payment to those class members who have not, as yet, manifested adverse health effects but who may manifest such effects in the future. This will be done after determining the number and nature of the claims submitted now for presently manifested adverse health effects. Some of the portion of the Fund set aside for such future claims may later become available for additional payments to class members presently suffering from adverse health effects, depending on the number of future claims. The number and nature of such future claims should become clearer with the passage of time.

C. A portion of the Fund -- in an amount yet to be determined -- will be set aside to assist children, including both those born before 1984 (who are class members) and those born in or after 1984 (who, although not members of the class, may be entitled to assistance from the Fund). Those afterborn children who elect to apply for and receive assistance from the Fund will be subject to the terms and conditions of the Settlement.

D. The designated kinds of adverse health effects entitled to compensation under the Fund may be modified periodically, based upon various scientific studies, some of which are now in progress.

E. In an effort to establish procedures and formulas for the allocation and distribution of the Fund, it is important to determine as soon as possible the current number and nature of the claims made by class members. The prompt filing of claims will allow determinations of both the amount of compensation to

be paid each eligible claimant and the administrative mechanism best suited for the processing of such claims. Therefore, all class members who desire compensation for adverse health effects which are already manifested must submit the enclosed Claim Form on or before October 26, 1984 (unless the Court determines that there is good and special reason for failure to meet this deadline). All class members who later learn of adverse health effects allegedly related to Agent Orange exposure that are not now known to them must return the Claim Form within 120 days thereafter.

F. The Claim Form is a preliminary but essential step. If you submit a Claim Form, you will be requested at a later time to submit medical proof and other important information in order to support your claim. The procedure for submitting such proof and other information, as well as other requirements pertaining to the processing and approval of the claim, will be included in the plan referred to above. NOT EVERYONE WHO SUBMITS A CLAIM FORM WILL RECEIVE COMPENSATION UNDER THE PLAN.

G. In developing and administering a plan for the allocation and distribution of the Fund to class members, there will be consultations with medical, scientific, economic, actuarial, insurance, and other experts. In addition, representatives of the class -- including Vietnam veterans -- will play an important role in providing advice concerning the best methods of achieving maximum benefits for eligible class members and afterborn children.

All class members who submit Claim Forms will be mailed notices describing the proposed plan after it is developed and other class members will be given notice by publication. All class members will have full opportunity to

present to the Court at that time any objections they may have to that proposal, whether or not they have objected to the Settlement as a whole.

IF YOU WISH TO APPLY FOR COMPENSATION FOR ADVERSE HEALTH EFFECTS WHICH ARE ALREADY MANIFESTED, YOU MUST COMPLETE AND MAIL THE ENCLOSED CLAIM FORM POSTMARKED ON OR BEFORE OCTOBER 26, 1984. ADDITIONAL COPIES OF THE CLAIM FORM MAY BE OBTAINED BY WRITING TO THE ADDRESS LISTED IN PARAGRAPH 6 BELOW.

IF YOU FAIL TO FILE THIS CLAIM FORM POSTMARKED ON OR BEFORE OCTOBER 26, 1984, YOU WILL BE BARRED FROM MAKING ANY CLAIM FOR ANY ADVERSE HEALTH EFFECT THAT IS ALREADY MANIFESTED (UNLESS THE COURT DETERMINES THAT THERE IS A GOOD AND SPECIAL REASON FOR YOUR FAILURE TO MEET THIS DEADLINE). IF YOU LATER LEARN OF ADVERSE HEALTH EFFECTS ALLEGEDLY RELATED-TO AGENT ORANGE EXPOSURE THAT ARE NOT NOW KNOWN TO YOU, YOU MUST RETURN THE CLAIM FORM WITHIN 120 DAYS THEREAFTER.

NOW, THEREFORE, TAKE NOTICE:

1. All potential members of the plaintiff class as defined above and in the Notice given on or about March 9, 1984 who did not request exclusion on or before May 1, 1984 as provided therein are members of the plaintiff class and. will be bound by the proposed Settlement, if it is approved, and by the Court's further orders in this litigation.

2. The Court will hold hearings at the times and places indicated below for the purpose of considering whether the proposed Settlement is fair, reasonable and adequate and should be approved. Each hearing will commence at 10:00 a.m. August 8, 9, 10, 1984, United States District Court, 225 Cadman Plaza East, Brooklyn, N.Y. 11201

August 13, 14, 1984, United States District Court, 219 South Dearborn Street, Chicago, Illinois 60604

August 16, 17, 1984, United States District Court, 515 Rusk Avenue, Houston, Texas 77002

August 20, 21, 1984, United States District Court, 75 Spring Street, S.W., Atlanta Georgia 30303

August 23, 24, 1984, United States District Court, 450 Golden Gate Avenue, San Francisco, California 94102.

If the Court approves the proposed Settlement following these hearings, it will enter a final judgment dismissing the claims of the class against these defendants, but reserving jurisdiction over the Settlement Fund for the purpose of allocating and distributing its proceeds to members of the Class and otherwise administering the Settlement.

3. Any class member who objects to the proposed Settlement may appear at any one of the hearings to show cause why it should not be approved by the Court or may communicate with the Court in writing prior to the hearing.

4. All class members who desire to claim compensation from the Settlement Fund for adverse health effects which are already manifested must complete and mail the attached Claim Form postmarked on or before October 26, 1984. Failure to do so will bar any such claim (unless the Court determines that there is good and special reason for failure to meet this deadline).

5. The Court will hold a subsequent hearing in United States District Court, 225 Cadman Plaza East, Brooklyn, N.Y., on September 24 and 25, 1984, to consider whether the application for attorneys' fees and expenses to be filed with the Clerk no later than August 31, 1984, should be allowed in

whole or in part. Any class member objecting to any such application will be heard at that time.

6. All written communications by class members to the Court other than Claim Forms should be addressed as follows:

Clerk, United States District Court for the
Eastern District of New York
P.O. Box 887
Smithtown, NY 11787

Claim Forms should be sent to the address shown on the Form.

DATED: Brooklyn, New York
This 11th day of June, 1984

_____

Jack B. Weinstein, Chief Judge
United States District Court
Eastern District of New York

AGENT ORANGE CLAIM FORM

IMPORTANT: IF YOU BELIEVE YOU CURRENTLY HAVE ADVERSE HEALTH EFFECTS RELATED To AGENT ORANGE EXPOSURE, RETURN THIS FORM NO LATER THAN OCTOBER 26, 1984. FAILURE TO RETURN THE FORM BY THAT DATE WILL PREVENT YOU FROM GETTING MONEY FROM THE SETTLEMENT FUND.

(Please type or print all answers. Additional pages may be attached for extended answers.)

(To Be Filled Out By All Claimants)
Information about Claimant

Claimant's Name (Last, First, Middle): _____
Social Security Number: _____
(Or Identification Number for New Zealand and Australian Claimants)
Current Address (Street): _____
(City, State): _____ (Zip)_____:
Home Telephone Number (Area Code, Number): _____
Work Telephone Number (Area Code, Number):_____
Sex (Circle One):(M)ale (F)emale
Date of Birth: _____ ____ ____
MONTH DAY YEAR
If you have an attorney, please give his or her name, address, and telephone number:
Attorney Name:_____
Firm Name: _____
Address (Street): _____
(City, State): _____ (Zip)_____:
Attorney Telephone Number (Area Code, Number): (__),___

Information about Veteran
Veteran's Name (Last, First, Middle): _____

Social Security Number: _____
(Or Identification Number for New Zealand and Australian Claimants)
Current Address (Street): _____
(City, State): _____ (Zip)_____:
Sex (Circle One): (M)ale (F)emale
Date of Birth: _____ _____ ____
MONTH DAY YEAR
Date of Death:_____ ____ _____
(if deceased) MONTH DAY YEAR
When did Veteran serve in the Armed Services? _____
FROM: _____ TO: _____
MONTH DAY YEAR MONTH DAY YEAR

In what branch of service did Veteran serve? _____
Did Veteran serve in or near Vietnam?(Y)es (N)o
If yes, when? FROM: _____
TO:_____
MO DAY YEAR MO DAY YEAR
What were Veteran's primary duties (e.g., Primary MOW __
_____
Where was Veteran located in or near Vietnam? _____

DATES

To the best of your knowledge, was
Veteran sprayed with Agent Orange? (Y)es (N)o _____
Did Veteran see spraying of Agent
Orange? (Y)es (N)o _____
Was Veteran in areas that had been
previously sprayed with Agent Orange? (Y)es (N)o _____
How often was Veteran in areas sprayed
with Agent Orange? (Circle One)
(C)onstantly (F)requently (S)eldom (N)ever

What is the reason you answered YES to any of the above questions? _____
_____
_____

PART II

(To Be Filled Out If Claim Is Based On Adverse Health Effects <u>On Veteran</u> Alleged To Be Related To Agent Orange Exposure)

Please describe any medical problems of Veteran that any doctor has advised, or you believe, are related toAgent Orange:

_____
_____
_____- _____
_____- _____

[f you have listed any problems above, please list here what effect, if any, such medical problems have had in Veteran's work, daily activities, etc.:

_____- _____
_____- _____

PART III

To Be Filled Out If Claim Is Based On Adverse Health Effects <u>On Children</u> Alleged To Be Related To Agent Orange Exposure)

Please list here any birth defects of children which you believe are related to Agent Orange exposure:

Name of Child	Birth Date	Mother's Name	Nature of Birth Defect
1. _____	_____	_____	_____
2. _____	_____	_____	_____
3. _____	_____	_____	_____

If any child is deceased, state name and date of death:
_____

Name and address of parent or guardian of each child if different from claimant:

_____

_____

PART IV

(To Be Filled Out If Claim Is Based On Miscarriages Alleged To Be Related To Agent Orange Exposure)

Please list here any pregnancies that did not result in a live birth which you believe are related to Agent Orange exposure:
Name and address of woman: _____

_____

Relationship to Veteran: _____
Date(s) of Miscarriage(s): _____
Has the woman received any professional counseling or advice on the possible effect of Agent Orange on her unborn children? (Y)es (N)o
Describe nature of such counseling or advice: _____

_____

NOTE:

IF YOU LATER LEARN OF ADVERSE HEALTH EFFECTS ALLEGEDLY RELATED TO AGENT ORANGE EXPOSURE THAT ARE NOT KNOWN TO YOU, YOU MUST RETURN THIS FORM WITHIN 120 DAYS THEREAFTER.

_____

SIGNATURE OF CLAIMANT

ALL CLAIMS FOR PRESENT ADVERSE HEALTH EFFECTS THAT YOU BELIEVE ARE RELATED TO AGENT ORANGE EXPOSURE MUST BE SUBMITTED

BY MAILING THIS FORM TO THE FOLLOWING ADDRESS ON OR BEFORE OCTOBER 26, 1984:

AGENT. ORANGE COMPUTER CENTER
P.O. BOX 905
SMITHTOWN, NEW YORK 11787

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re	:	MDL No. 381
"AGENT ORANGE"	:	
Product Liability Litigation	:	
MICHAEL F. RYAN, *et al.*,	:	
Plaintiffs,	:	
-- against --	:	79 C 747
DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL, INC., and THOMSPON CHEMICALS CORPORATION,	:	
Defendants.	:	

[Excerpt of]

OBJECTION OF WILLIAM P. STIMSON TO PROPOSED SETTLEMENT OF CLASS ACTION

COMES NOW William P. Stimson ("Stimson") and, appearing herein, respectfully objects to the proposed Settlement Agreement annexed to the Notice of Proposed

Settlement of Class Action, dated June 11, 1984 ("Notice"), and to certain of the actions upon which such proposed Settlement Agreement ("Agmt.") is based. Stimson objects to the proposed Settlement Agreement principally on the ground that it permits defendants to impose an absolute limitation on their potential liability to the members of the plaintiff class wholly without regard for the number and nature of the class claims. Stimson also objects on the basis of, *inter alia*, the definition of the plaintiff class and the conflicts of interest of class counsel.

* * * *

[4] interests of the class, for the Court to ignore information soon to be available from those studies and to approve a settlement that operates to limit arbitrarily potential recoveries future claims for serious health effects whose causal relationship to Agent Orange exposure is not now clearly understood, particularly where such effects may not yet be manifested.

6. Stimson objects to the definition of the plaintiff class because class membership is determined according to whether a person's injury was caused by exposure to Agent Orange. Notice at 1-2. "Causation" -- which is denied by defendants -- is a fundamental issue in this litigation which, under the proposed plan, is to be determined only after the class members have had their rights limited by entry of judgment. Notice at 6, 7-9. Accordingly, the composition of the class is at this point indeterminate and based on speculation.[3]

[3] Moreover, given the medical profession's imperfect understanding of the consequences of exposure to Agent Orange, it is reasonable to anticipate that some plaintiff class members may presently suffer from adverse health effects related to Agent Orange exposure without suspecting the cause of such effects. It would have been misleading and improper for the Court to have authorized dissemination of a notice describing the plaintiff class solely on the basis of "causation" and

[5] 7. Stimson objects to the Settlement Agreement on the ground that it contemplates some plaintiff class members receiving no compensation, notwithstanding their having been injured as a result of exposure to Agent Orange. Notice ¶ A at 8. The Court has a duty to insure that counsel for the named plaintiffs do not abandon the interests of any members of the plaintiff class while advancing the interests of other "qualifying" class members.

8. Stimson objects to the definition of the plaintiff class and the Settlement Agreement on the ground that they include within their scope persons who have not yet manifested injury (Agent. ¶ 8 at 7) because:

(a) It is impossible presently to determine the identities of persons who may in the future manifest injury. As a consequence, the composition of the plaintiff class is indeterminate and based on speculation.

(b) Where plaintiff class members are not presently aware that they have been injured, they cannot be expected, on receipt of notices from the Court, to make informed decisions respecting their participation in this litigation.

(c) Under the laws of many states, the claims of such persons have not yet accrued and, accordingly, cannot be resolved in this litigation.

[6] (d) The Court cannot permit persons born after January 1, 1984 -- who are not members of the plaintiff class (Notice ¶ C at 9) -- to receive compensation from the proposed Fund because the Court has a duty to insure that counsel for the named plaintiffs represent only the interests of the members of the plaintiff class and do not sacrifice

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without including any statement as to the kinds of disabilities that are attributed to Agent Orange exposure. Although Stimson has not yet had an opportunity to review the contents of the notice given pursuant to the Court's December 16, 1983 order, the class description contained in the June 11, 1984 Notice suggests that the original notice may have suffered from the defect described in this footnote.

those interests in favor of non-members. This Court has no jurisdiction to grant relief to such persons who are neither named parties nor class members and who are strangers to the litigation.

(e) Because the Settlement Agreement contemplates that awards of compensation for presently manifested health effects may be adjusted downward to make moneys available for class members who manifest compensable effects in the future (Notice ¶ A at 8) and contemplates that the proposed Fund will not be finally disposed of for at least 25 years (Agmt. ¶ 4 at 6), it appears that for an extended period class members with presently manifested disabilities will have only a conditional and revocable right to compensation. To defer in such a manner the final adjudication of rights to compensation for presently manifested injuries is fundamentally unfair, unreasonable and inadequate and contrary to the best interests of the class.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

In Re

MDL No. 381

"AGENT ORANGE"
Product Liability Litigation

----------x

United States Courthouse
Brooklyn, New York

August 10, 1984
10:00 o'clock A.M.

Before:

HONORABLE JACK B. WEINSTEIN, Chief U.S.D.J.

* * * *

[702] Honor might look at is the risk attendant upon the establishing of liability. At the first fairness hearing members of the Management Committee set out what they felt were some of the risks attendant upon the establishing of liability. And I would like to attempt to briefly touch upon those various factors.

The first factor, your Honor, is one which seems to have troubled you most greatly during the course of these hearings. And that's with respect to the ability of plaintiffs to prove causation. Your Honor has stated that your Honor must deal with the present and must deal with the state of scientific evidence as it exists today for purposes of proving that exposure to 245-T or dioxin or some combination thereof caused the particular ailment of those class representatives who were before your Honor. And so I would like to address myself specifically to the case which can be made, which could possibly have been made for proving causation with respect to the class representatives. I

cannot speak to all of the class representatives, your Honor, because I am not familiar with all their cases.

[703] With respect to two of those representatives, however, they are my clients and I am familiar with their cases. The first case, your Honor, which you had before you was the class representation of Danny Ford. Danny Ford, your Honor, had a radimile sarcoma. It is a rare soft-tissue sarcoma. The plaintiffs' Management Committee ably pulled together a team of experts who were prepared to testify with respect to general causation and specific causation concerning Danny Ford's causal link between exposure and a soft-tissue sarcoma.

If I may, your Honor, I would just like to identify some of those experts, their area of expertise, to indicate that there were credible scientist is prepared to testify to a causal link between his exposure and his problem.

Arthur N. Galston, Professor of Botany, Department of Biology, New Haven, Connecticut.

Dr. Alistair W. N. Hague, Department of Chemical Pathology, University of Leeds, Leeds, England.

Dr. Deborah Barsotti, Professor of Proctology, Philadelphia College of Pharmacy and Science, Philadelphia, Pennsylvania.

Dr. Ellen Silbergeld, Chief Proctologist, Environmental Defense Fund, Washington, D.C.

THE COURT: She was going to testify that his sarcoma was caused by his exposure?

MR. TAYLOR: No, your Honor. In particular she

* * * *

[724] In researching the cases, those that exist in the Second Circuit, we have found additional factors which courts have suggested that might be looked at in determining the adequacy, reasonableness and fairness.

One of those is the TBK Partners, Ltd. case versus Western Union Corporation, 675 Fed. 2nd, 456, where the Court of Appeals suggests that a judge looking at a settlement might inquire whether there has been a release of a claim which was not asserted within the class action or not shared by all class members which represents an advantage to the class by an uncompensated sacrifice of the unrepresented claims.

In this instance, your Honor, we had no class representative who was representing the estate of someone who had died, and it is a tragic situation but then those veterans are dying they are dying at a very young age and because they have died at a young age, their estate would have received in terms of lost income, earned over their lifetime, a substantial amount of money.

In the absence of a class representative to protect their interests, I suggest that there may have been a possible compromise and I only suggest that you inquire into this. I have no information as to this, with respect to their particular interest.

[725] In that same vein, your Honor, although with a slightly different twist, the class counsel has a fiduciary duty to a class and only to that class and they may not represent competing interests.

Within the settlement agreement are two proposals, which trouble me and I suggest that your Honor inquire into that.

One is that there is a provision which allows the defendants should they have a state court judgment rendered against them to go to the settlement fund, which is for class members and pull the money out of that settlement fund and give it to those who have been successful in a court of law, up to $10 million, with some provision for doing that in the future should there be excess monies.

What your Honor might inquire is, has there been a conflict of interest here which has not been resolved perhaps

and an appointment of an attorney to represent that particular interest.

THE COURT: I am not sure I follow you.

What interest?

MR. TAYLOR: I have some difficulty with that argument myself, your Honor. It is more a concern

* * * *

[729] THE COURT: Good.

MR. TAYLOR: Again, in this area of representation, the class was redefined to include service persons who had not manifested injury, nor claimed injury.

THE COURT: Correct.

MR. TAYLOR: There was no class representative in this class action who had not manifested injury and who had not claimed injury. So to that extent --

THE COURT: We have a number of people who have testified at these hearing who say we don't have an injury now, but we are concerned about the future. They are protected by the settlement to the extent that the settlement can protect anybody. They are within the class.

So if they have a manifestation in the future, they are entitled to do some compensation. Whatever it is.

Part of the problem of structuring the payments will be to take care of what has been referred to as the tail of possible claimants.

MR. TAYLOR: Your Honor, I respectfully submit that that may be a different question from whether they were adequately represented at time of negotiations to be sure that they had enough money **[730]** in that fund to provide them, in the future and their-

THE COURT: Well, at the second stage, we will certainly hear from them.

But again, to appoint another attorney to represent that sub-group would just, in my opinion, increase the amount of legal fees, which is what all of us want to keep to a bare minimum.

There are lots of arguments and classes and sub-classes, but if we appoint attorneys and guardians ad litem for everybody who might have a -- somewhat of a conflict of interest, there is hardly going to be any money left for the veteran.

That's the problem here.

To try to keep the transactional costs at a minimum, at the same time being fair. It is difficult.

MR. TAYLOR: Yes, your Honor.

I do not envy your task. You have done a tremendous job.

THE COURT: No, please. I haven't done anything yet. I'm just here listening.

I am not questioning you in any hostile way. I'm questioning you in order to better understand and work with you in developing the problem as you appreciate, of course.

[731] MR. TAYLOR: That is clearly understood.

I appreciate the questions and more than welcome them.

Your Honor, the case of Weinberg at 698 Fed 2nd, 77, suggests that if a class is newly redefined, that there must be notice to that new class and there must be some affording them of an opportunity to opt out.

(Continued on next page.)

[732] THE COURT: How is the class redefined?

MR. TAYLOR: Your Honor, originally, the class arguably was only those Viet Nam veterans who had manifested an injury and who had claimed an injury.

THE COURT: The class as I defined it was broader, wasn't it?

MR. TAYLOR: As you eventually defined it, that's correct, your Honor.

THE COURT: The notice went out after I defined it, didn't it?

MR. TAYLOR: Your Honor, I believe that the settlement notice -- let me not speculate. If I may, I will just find the appropriate documents.

THE COURT: I defined the class in my class action opinion and then notice went out on that class as then defined.

I think the class as originally defined, included those who may manifest later but I may be mistaken and if I am I will be happy to have another look at it.

MR. TAYLOR: Your Honor, I think that this is something you probably will be -- will probably be taken care of in a subsequent written submission.

I will look carefully at the documents.

THE COURT: It is a question of interpretation **[733]** of original language. I believe the original language properly interpreted included after manifestations.

MR. TAYLOR: Your Honor, an objection to the settlement which I have frequently heard by my clients and also one which is to be found in the -- as a question to be asked by your Honor as suggested by a Court of Appeals in the 5th Circuit, Parker versus Anderson, 677, Fed. 2nd, 1204, is whether the amount of attorneys' fees was approved before or at the fairness hearings.

Certainly, my clients would like to know the total amount of the settlement fund prior to saying that it in fact is fair or unfair.

THE COURT: Well, I can't give you that because we are not going to get the applications until after these hearings are over.

However, we will have a public hearing on the attorneys' fees, so if you wish to be heard, I'll be glad to hear you. But I can't give you that information now.

I understand your problem.

MR. TAYLOR: Your Honor, I am pleased to hear that there will be subsequent hearings with respect to the structure and the protocol for payments of monies out of the fund, and perhaps once that is **[734]** known to my clients, they might better be able to determine the adequacy and the fairness of this hearing.

THE COURT: I have already issued an order, the magistrate has issued a form to make application. I forget the dates, but they are in my written opinions, and they are in the notice, with respect to when the applications have to be in. I think we have moved the hearing from, what is it, September 25th to 26th.

THE CLERK: Yes, your Honor.

THE COURT: So on September 26th we will have the first day of hearings on the applications for fees. At that time, you will have everybody's fees on record and anybody can go down to the courthouse and examine everybody's application.

MR. TAYLOR: Your Honor, may I inquire -- it is not clear in my own mind. Will the approval, should it come from the court for the settlement, will that occur after both the protocol hearings, the hearings to determine the standard for who will receive how much as well as after the -- the attorneys' fees have been established?

THE COURT: My present plan is to hold the

* * * *

[736] before me because you have always been fully prepared and very helpful.

Thank you very much.

MR. TAYLOR: I enjoyed being here, your Honor. Have a good day.

THE COURT: Next.

THE CLERK: Mr. Christopher Gregory.

MR. GREGORY: Good afternoon, your Honor. I'm Christopher Gregory.

THE COURT: Good afternoon.

MR. GREGORY: I'm from the Commonwealth of Massachusetts. I'm the director of the Agent Orange Program which operates out of the office of Commissioner of Veterans Services in Massachusetts.

THE COURT: Yes, I've read some of your articles. They are very good.

MR. GREGORY: Thank you.

THE COURT: I must say.

MR. GREGORY: Thank you very much.

I'm joined this afternoon by some colleagues from Massachusetts. We have come to tell you what we've been doing the past month.

Our program is set up primarily to conduct research. We have a legislative mandate to conduct research.

[737] We also have a small component of our program is four Out-Reach & Service.

When we first heard of these hearings, we quickly convened a series of meetings around the state, to try to establish the opinions of the veterans of Massachusetts.

The Commissioner of Veterans Services, John Halachis is himself opposed to the settlement and wishes to be recorded as such.

But we attempted to set up these hearings, seminars, to effective sample the opinions and the sentiments of the veterans.

We set them up in cities and towns around the state in Summerville, Lynn, Boston, Wuster, Greenwild, New Bedford, Springfield and North Hampton.

We also attempted as we were able to sample the opinion of organizations that we felt represented veterans and interested individuals.

There was in our sampling we found, which was not incidentally conducted along a rigid demographic line or with votes or with other clear markers. We were really just trying to examine the sentiments. It is a complicated question to ask for a veteran. Also, we found there was not enough information to ask people to -- for clear opinion. We were educating to parts of this question as we went along.

[738] We found that a minority of the veterans were for the settlement, as it is presented.

I would say, sampled 700 or so veterans, this minority wedge was quite small. If I had to -- if I had to name a number I would say probably 5 percent or less.

I think there was two reasons that stood out why the veterans who were for the settlement were for the settlement.

There was a very small number who were quite cynical about the proceedings at all and believed that, cynically believed I think, that they have to accept whatever is given them and that they have -- that their complaints are not taken at all seriously and this is the best chance that they will ever have to make a case.

I think the second one represents a greater portion of the minority. I think that is characterized by an instinct that for helping those people, their fellow veterans, that they see suffering.

I think in most cases those veterans would themselves be willing to give up benefits that might be coming to them if they felt that that would -- that by taking those benefits, would deny someone who is in worse straits than they. I think this is a very generous impulse.

[739] As I said, though, the overwhelming majority was against this settlement and they expressed themselves quite clearly.

In that way, in some -- some meetings were unanimously against the settlement. Some of the sentiment was quite vehement.

Some four points stand out why they were against the settlement.

The first I think is they were confused on the facts of the settlement and even though they had in many cases read the literature that had come from the court and from other organizations, they were still confused and lengthy explanations did not seem to help as much as they might.

They really didn't know what they were deciding. They felt that their -- I think that their lack of knowledge of what they were deciding created quite a bit of suspicion.

I think also they weren't sure if a settlement is accepted what sort of influence they would have over the process of the protocol of how appeals are to be made to the court for compensation.

[740] More than one veteran expressed that the process should be reversed, that they should clearly understand what the process would be before they were asked to decide one way or another.

The second point that I think came out most strongly was that there is a basic mistrust of any settlement where there is no acceptance of responsibility for the damage that they believe has been done to them and to their children.

Third, I don't believe they believe that the amount of money is capable of providing the relief that they need.

And fourth I think is a bit more complicated but I'll do my best.

(Continued on next page.)

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[769] tion so that the plaintiffs can receive treatment as well as compensation, then I would like to propose to the court that this documentation not be returned to the defendants, but

instead be released to the public so that it may be used for research, organizations, to develop diagnostic and treatment techniques to be used hopefully to resolve some of the medical problems of the plaintiffs in this case.

If you are inclined to certify this agreement, I would implore you, your Honor, to extend the period of opting out to the October 26th deadline, as you have for the opting-in process.

Now, as to the question before the court, is this proposed settlement fair? Your Honor, it is my very humble opinion that the proposed agreement as it is now structured does not have one ounce of fairness and definitely is not in the best interest of the plaintiffs in this case.

Veterans of the South Viet Nam conflict who have served honorably when called to duty by this country.

Your Honor, I have listened intently over the past three days to the testimony presented to you. It is my perception that the opinions expressed by the hard-core combat veterans after having

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION PURSUANT TO RULES 52(B) AND 59(E) TO RECONSIDER THE ORDER OF JANUARY 7, 1985 WHICH APPROVED THE SETTLEMENT

Dated: March 7, 1985

Robert A. Taylor, Jr.
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400

* * * *

[93] incident of deaths due to *stomach cancer* in railroad workers exposed to phenoxy herbicides was also reported in Axelsson and Sundell (1977) (2 deaths; .33 expected)[71] and in an unpublished update,[72] malignant mesenchymal tumors were reported by Hardell (1977)[73] in Swedish forestry and agricultural workers. Hardell suspected exposure to phenoxy herbicides as the cause. *Id.* In Hardell and Sandstrom

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[71] Axelsson, et al. (1977). Phenoxy acids and cancer. *Lakartidningen* 74 (35):2887-2888.

[72] Axelsson, et al., (undated) Herbicide exposure and tumor mortality: An epidemiological investigation on Swedish railroad workers. Unpublished paper.

[73] Hardell, L. (1977) Malignant Mesenchymal tumors and exposure to phenoxy acids -- a clinical observation. *Lakartidningen* 74:2753.

(1978)[74] and Hardell and Sandstrom, (1979),[75] a statistically significant increase in the incidence of malignant mesenchymal soft-tissue sarcomas was reported among forestry workers exposed to phenoxy herbicides and chlorophenols. Erikson, et al. (1979)[76] similarly reported statistically **[94]** significant increases of *soft-tissue sarcomas* among Swedish forestry workers exposed to 2,4-D, 2,4,5-T, MCPA and phenoxypropeonic acids. Workers in occupations with a history of exposure to phenoxyacetic acids were reported to be at a greater risk of developing lymphoma with either Hodgkins disease or non-Hodgkin's lymphoma. *See*, Hardell (1979)[77] and Hardell, et al. (1980).[78] When Honchar and Halprin reviewed data from industry studies finding no increased incidence of soft-tissue sarcomas, they found that 2.9% of the 105 death among workers exposed to 2,4,5-T (possibly with dioxin) were from soft-tissue sarcomas when only 0.07% were expected in a similar age population. Honchar and Halprin (1981).[79]

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[74] Hardell, et al., (1978) Malignant mescuchymal soft-tissue tumors and exposure to phenoxy acids or chlorophenols. *Lakartidningen* 75:3535-3536.

[75] Hardell, et al., (1979) Case-control study: Soft-tissue sarcomas and exposure to phenoxy acetic acids or chlorophenols. *Dr. J. Cancer.* 39:711-717.

[76] Erikson, et al., (1979) Case control study on malignant mesenchymal tumors of the soft tissue and exposure to chemical substances. *Lakartidningen* 76:3872-3875.

[77] Hardell, L. (1979) Malignant lymphoma of histiocytic type and exposure to phenoxy acetic acids or chlorophenols. Lancet 1 (8106) 55-56.

[78] Hardell, et al. (1980) Malignant lymphoma and exposure to chemical lymphoma and exposure to chemical substances, especially organic solvents, chlorophenols and phenoxy acids. *Lakartidningen* 77 (4) :208-210.

[79] Honchar, et al., (1981) 2,4,5-T trichlorphenol, soft tissue sarcoma. *Lancet* Jan. 31:268-269.

After a study of 110 workers, 22.7% of whom reported exposure to phenoxy herbicides, *Erikson*, et al. (1981)[80] **[95]** reported a relative risk of soft-tissue sarcomas among the exposed to be 6.8 times greater than among the unexposed.

Chlorinated phenols have been found to be contaminated with polychlorinated dibenzo-p-dioxins. Hardell, et al. (1982)[81] reported a relative risk 6.7 times greater for *nasal and nasopharyngeal cancer* among workers exposed to chlorinated phenols than for unexposed workers.

After a case control study of 123 men with non-Hodgkin's lymphoma, Olson and Brandt (1981)[82] concluded that cutaneous lesions of *non-Hodgkin's lymphoma* might be uniquely associated with exposure to polychlorinated dibenzo-p-dioxins contaminants of phenoxy herbicides and chlorophenols. When Theiss and co-workers (1982)[83] studied the mortality of 74 workers who had been exposed to TCDD and trichlorophenol during a process accident, they concluded that the increased incidence of *stomach carcinomas* among the exposed cohort could not be explained by **[96]** chance. Bishop and Jones (1981)[84]

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[80] Erikson, et al., (1981) Soft-tissue sarcomas and exposure to chemical substances. *See also*, Hardell, L., Relation of soft-tissue sarcoma, malignant lymphoma and colon cancer to phenoxy acids, chlorphenols and other agents. *Scand. J. Work. Environ. Health* 7:119-130.

[81] Hardell, et al. (1982) Epidemiological study of and nasopharyngeal cancer and their relation to phenoxy acid or chlorophenol exposure. *Am. J. Industrial Med.* 3:247-257.

[82] Olson, H. and Brandt, L. 1981 Non-Hodgkin's lymphoma of the skin and occupational exposure to herbicides. *Lancet* (2):579.

[83] Theiss, et al., (1982). Mortality study of persons exposed to dioxins in a trichlorophenol process accident in the BASF AG on November 17, 1953. *Am. J. Ind. Med.* 3:179-189.

[84] Bishop, et al., 1981. Non-Hodgkin's lymphoma of the scalp in workers exposed to dioxin (letter). *Lancet* (2):369.

reported two cases of *non-Hodgkin's lymphoma* in workers at a plant that manufactured pentachlorophenol (contaminated with PCDD). Only 0.28 *non-Hodgkin's lymphomas* are expected among a work forced *the size of the group studied.* Johnson, et al. (1981)[85] reported a *fibrosarcomatous mesothelioma* and *liposarcomas* in a father and son who worked at a chlorinated phenols plant. In 1981, Moses and Selikoff (1981)[86] reported a malignant *Schwannonma (soft-tissue sarcoma)* in a Monsanto worker who had a history of exposure to phenoxy herbicides.

Not surprisingly, in Midland County, Michigan, where the Dow Chemical Company manufactured "Agent Orange," the rates of mortality from *soft-tissue and connective tissue* cancers in white females were 3.8 times higher than the national average for the period 1960-1969. During that period Dow was disposing of its waste streams and delivering "Agent Orange" to the Government. After greater latency, the rate was 4.0 times higher than the national average (1970-1978). These findings **[97]** were reported by the Michigan Department of Health in 1983.[87]

Concerned about an unusual clustering of rare cancers in New South Wales, Australia where 2,4,5-T spraying had occurred, caused MacLennan, et al. (1982)[88] to compared the incidence of cancers and mortality from cancer experienced by people living in the suspect area and an area where 2,4,5-

[85] Johnson, et al., (1981) Soft tissue sarcomas and chlorinate phenols. *Lancet* (2):40.

[86] Moses, M. and Selikoff, I.J., (1981) Soft-tissue sarcomas, phenoxy herbicides, and other chlorinated phenols. *Lancet* (1):1370.

[87] Michigan Department of Public Health (1983) Evaluation of soft and connective tissue cancer mortality rates for Midland and other selected Michigan counties compared nationally and statewide. May 4, 1983.

[88] MacLennan, et al., (1982) Cancer in the Blue Mountains of New Smith Wales. *Med. J. Aust.* 2:319-323.

T spraying was believed not to have occurred. MacLennan, and co-workers found a higher-than-expected incidence of *cancer of the pancreas, multiple myeloma, myeloid leukemia* and *melanoma* in males.

Although a self selected population, it is interesting to note that the incidence of *malignant neoplasms* of the *buccal cavity* or *pharynx* (7.9%) and *lymphomas* (20.0%) among 84,456 registrants on the Agent Orange Registry were significantly higher than the incidence of those cancers in all United States males of a similar age group. *See*, Young, et al. (1983)[89]

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[117]

Hardell (1979)	Lymphoma	Not an epidemiological study; 14 of 17 lymphoma patients had a history of exposure to phenoxyacetic acids and chlorophenols
Hardell et al. (1980)	lymphoma (+)	41 of 149 with lymphoma had a history of exposure to phenoxyacetic acids; the relative risk of a lymphoma from exposure was 4.8 times higher than for unexposed persons in the study
Honchar & Halprin (1981)	soft-tissue sarcomas (+)	Of 105 workers exposed to TCP or 2,4,5-T 2.9% died of

[89] Young, et al., (1983) Chlorinated dioxins as herbicide contaminants. *Enviro. Sci. Technol.* 17:531A-540A.

		soft-tissue sarcomas when only 0.07% deaths were expected.
Erikson, et al. (1981)	soft-tissue sarcomas (+)	Relative risk of soft-tissue sarcoma from exposure to phenoxy herbicides was 6.8 times higher than for unexposed persons in the study population
Hardell (1981)	soft-tissue sarcomas (+)	The relative risk for soft-tissue sarcomas among those exposed to chlorinated phenols or phenoxy herbicides was 8.2 times higher than for unexposed persons it the study population; reanalysis of earlier data
Hardell, et al. (1982)	nasal and nasopharyngeal cancer (+)	Chlorinated phenols contain PCDD's; the relative risk for nasal and nasopharyngeal cancer from exposure to chlorinated phenols was 6.7 times higher than for unexposed persons it the study
[118] Smith, et al. (1982)	soft-tissue sarcomas	When definitively exposed considered by year of birth, relative risk of soft-tissue sarcomas from exposure to phenoxy herbicides was 1.7 times higher than for

		unexposed in the study
Olson & Brandt (1981)	cutaneous presentation of non-Hodgkins lymphoma	cutaneous presentation of non-Hodgkin's lymphoma is exceedingly rare
Barthel (1981)	bronchial carcinoma (+)	Pesticide applicators who used 2,4-D and 2,4,5-T and other pesticides were studied; the pesticide applicators were 2.1 times as likely to die of bronchial carcinoma than population statistics indicated could be expected
Milham (1982)	Hodgkin's disease; soft-tissue sarcoma (+)	A proportional mortality ratio (PMR) found to be increased among farmers for soft-tissue sarcomas and pulp and paper mill works for Hodgkin's disease; professions reported exposure to phenoxy herbicides or chlorinated phenol which probably contained PCDD's
Theiss & Coworkers (1982)	stomach carcinomas (+) colon cancer (+)	Cohort study with 2 control groups;
Bishop & Jones (1981)	non-Hodgkin's lymphoma	Out of 158 workers exposed to pentachlorophenol (with possible PCDD

contamination) 2 cases of non-Hodgkin's lymphoma were observed; the expected incidence was only 0.28

* * * *

[155] within the range of reasonableness in light of the best possible recovery. The settlement must be rejected.

There were minimal risks attendant trial of the class action representatives' cases. This has been acknowledged by the Plaintiffs' Management Committee. They have consistently taken the position that the cases would have been won at the trial level. Victor Yannacone and Benton Musslewhite confirm the absence of risks attendant trial. Only with respect to an appeal have members of the Plaintiffs' Management Committee expressed concern. What the Court of Appeals might do, however, is not a basis upon which this Court may accept an inadequate, unreasonable and unfair settlement.

In sum, a review of the factors set forth in *Grinnell I* call for the Court to reconsider its approval of the $180 million settlement and to find that settlement to be unfair, unreasonable and inadequate. Additional considerations call for the Court to vitiate the settlement.

III.

In Addition to the Grinnell Factors, There Are
A Number of Other Reasons to Vitiate The Settlement

A. The Class Action Representatives May Have Been Inadequate

No class representative represented class members who were deceased or who had not manifested injury. All of the class representatives were living and had manifested injury. The **[156]** interest of those who had died or not yet

manifested injury were not protected. Indeed, the interests of living class representatives who had manifested injury were antagonistic to the interests of those who had died and to those who had not yet manifested injury. The more money set aside for those who had died and for those who had not yet manifested injury, the less money available to those who are living and who have manifested injury.

In fact, the interests of those who have died may have been sacrificed to obtain a settlement for the living class members. In seeking a 23 (b) (1) (B) certification, the class action representatives stated to the Court that the wrongful death and survival claims *alone* would amount to $10 billion. *See*, Special Master's Report Re: Applicability of 23 (b) (1)(B), Docket No. 1562a at 7. The settlement was for only $180 million. A question is clearly raised as to whether the claims of those who had died were sacrificed to obtain a settlement for the living class members.

Special Master Feinberg's distribution scheme suggests that the interests of those who have died are still being sacrificed for the interests of those who are living. Under Special Master Feinberg's proposal, wrongful death and survival claims will be limited to $5,000 dollars to be paid out over 10 years while those living class members with cancer may receive a maximum of $25,000. *See*, Exhibit 9. Indeed, the class action **[157]** representatives may not have even adequately protected their own interests much less the interests of those class members they represented.

According to three class action representatives, the class action representatives were not consulted about demands, or counter offers during the settlement negotiations but rather were requested to approve a *fait accompli*. Prior to becoming class representatives, David Lambiotte and Danny and Christine Ford were Ashcraft & Gerel's clients. After the settlement negotiations, all three class representatives advised Robert A. Taylor, Jr., a member of the firm of Ashcraft & Gerel, that they had not been consulted during the

course of settlement negotiations and were simply asked to approve the settlement once completed. *See*, Exhibit 1.

In approving this settlement, the Court has an obligation to be sure that the class representatives were adequate representatives of the class as originally certified and as enlarged by the settlement agreement. *Malchman v. Davis*, 706 F.2d 426, 432 (2nd Cir. 1983).

> Not only must the court examine whether plaintiffs had interests antagonistic to those of other class members (citations omitted), but also whether the class representative 'possess[ed] the same interest and suffer[ed] the same injury' as the class members (citations omitted).

Id. at 433. As set forth *infra*, the class definition in the Legal Notice of Pendancy of Class Action was altered by the **[158]** Settlement Agreement to include the claims of those who had not yet manifested injury. All of the class representatives had manifested injury. Not one of the class representatives was an adequate representative of those class members who had not yet manifested injury.

The Court must also take care to assure that there is no release of claims not shared by all members of the class, e.g. wrongful death claims, which represents an advantage to the class by the uncompensated sacrifice of those claims. *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2nd Cir. 1982). The class action representatives were inadequate representatives of those class members with wrongful death and survival claims. They had not suffered those injuries. Furthermore, there may have been an uncompensated sacrifice of the wrongful death and survival claims to advantage the class. The future claims of those who had not yet manifested injury may have been sacrificed in order to obtain a settlement for those class members who had manifested injury. Finally, the class action representatives were totally excluded from the settlement negotiations. They could not, therefore, protect their own,

much less class members' interest. The Court must inquire into these matters or permit discovery by counsel prior to any finding that the settlement is fair, reasonable and adequate. **[159]**

B. Statements Under Oath By Benton Musslewhite And Victor J. Yannacone, Jr. And Certain Memoranda Released By Victor J. Yannacone, Jr. Indicate That Class Action Counsel May Have Been Inadequate

A statement under oath by Victor J. Yannacone, Jr., a copy of which is found as Exhibit 21, and certain memoranda released by him, copies of which are found as Exhibit 11, raise serious questions as to the adequacy of class action counsel. Class action counsel must have been adequate representatives of the class from the beginning to the end of the litigation. Any breach in adequacy may have materially affected the litigation and adversely impacted on settlement. According to Mr. Yannacone, class action counsel were clearly inadequate to the task of protecting class members' interests from shortly after the organization of Yannacone & Associates (hereafter, also the Consortium) to approximately May, 1983 when he removed himself from the Consortium.

Mr. Yannacone's statement under oath paints a distressing picture of small Long Island firms lacking the finances, manpower and desire to be class action counsel. Unless otherwise indicated, the following information was obtained from Statement Under Oath by Victor Yannacone, Jr., Exhibit 21. Page references are to Mr. Yannacone's statement. Ashcraft & Gerel does not vouch for the truth or veracity of Mr. Yannacone's statements but only suggests that his statements under oath raise serious questions as to the adequacy of counsel **[160]** and as to the consequent fairness, reasonableness and adequacy of the settlement.

Yannacone & Associates was established in September, 1979 (p. 12). The Consortium consisted primarily of small firms (pp. 31, 38-39). A number of the members did

principally defense work in personal injury cases (pp. 31-32). Other than Mr. Yannacone, none of the members of the Consortium had experience in large product liability or mass toxic tort litigation (p. 43). Due to the size of their offices and the press of other practice sustaining litigation, each of the member firms assigned only one attorney on a part-time basis (p. 31). No law clerks or paralegals were assigned to the case (p. 39).

Among the firms in the Consortium, only one high speed copier existed (pp. 37-38). That copier was in Mr. Yannacone's possession. All the other firms had only small convenience copiers (p. 38). At various stages, only a few firms in the Consortium had any word processing capability (pp. 40-41). An attempt at computerization was made but aborted for financial reasons (pp. 39-40, 42).

From the inception of Yannacone & Associates to approximately April, 1983, members of the Consortium refused to review microfilmed documents produced by the government and defendants (pp. 34-36). The government began producing documents on microfilm in April of 1981. By April of 1983, over **[161]** 283 rolls of microfilm had been produced by the government. Mr. Yannacone purchased some of the rolls in July of 1982 (p. 34). Mr. Keith Kavanaugh and Mr. Yannacone were forced to read approximately 140 rolls without any help from other members of the Consortium (pp. 34-36). Requests by Mr. Yannacone for help from Consortium members went unheeded (p. 37). The documents produced by the chemical companies went unreviewed with limited exception (pp. 35, 41). According to Mr. Yannacone, "[a] decision was made . . . that no attention would be paid to causation, and no attention would be paid to preparing any document search even in the area of liability" (p. 34). Apparently, a decision was also made "largely on the basis of costs" that no depositions would be taken by plaintiffs until defendants had completed their deposition discovery (p. 59).

When motions for summary judgment were made on the government contract defense in April of 1983, Yannacone & Associates was unprepared to respond (p. 69-69A). Dow, Hercules, Thompson Hayward (now T.H. Agriculture & Nutrition Company), Uniroyal and Thompson Chemical Company moved for summary judgment. Ashcraft & Gerel, which had become a member of a newly formed Plaintiffs' Management Committee only a month before, was called upon to write the oppositions to three out of the five motions for summary judgment (pp. 68-69A). Ashcraft & Gerel was originally asked to write the oppositions to Dow's and Thompson Hayward's motions for summary judgment. Having **[162]** completed that task, Robert A. Taylor, Jr. of Ashcraft & Gerel was asked the day before it was due to also write the opposition to Thompson Chemical Company's motion for summary judgment. He did so (pp. 68-69A). Ashcraft & Gerel also provided all the documents necessary for a member of Yannacone & Associates to write the opposition to Uniroyal's motion for summary. *See*, Affidavit of Robert A. Taylor, Jr., Exhibit 1. Only the oppositions to Hercules' and Uniroyal's motion for summary judgment was not written by Ashcraft & Gerel. *Id.* Summary judgment was granted to defendant-Hercules by the Honorable George C. Pratt. *See*, Affidavit of Robert A. Taylor, Jr. for an explanation as to why Ashcraft & Gerel as *non* MDL lead counsel or class counsel from the beginning of the litigation to March, 1983 was prepared to respond to defendants' motions for summary judgment approximately two months after joining the Plaintiffs' Management Committee.

By May of 1983, when Mr. Yannacone removed himself from Yannacone & Associates, between 150-200 depositions had been taken by defendants (pp. 54, 58-59). Numerous requests by Mr. Yannacone prior to May of 1983 for aid in reviewing the depositions met with no response from the other members of Yannacone & Associates (p. 54).

Apparently, the primary problem was finances. There were insufficient finances to pay for deposition transcripts;

telephones; computers and computer services; clerical personnel and computer key operators; travel; copying; microfilm machines **[163]** and the miscellaneous expenses associated with litigation (pp. 34, 37-38; 40, 42; 51-53; 57-59). Importantly, a refusal by the Consortium to commit time and resources made it impossible to move for partial summary judgment on elements one and two of the government contract defense (p. 66). A lack of adequate finances appears to have also been at the root of major personality clashes within Yannacone & Associates which paralized that group. (Musslewhite Statement, p. 10).

Mr. Yannacone withdrew from Yannacone & Associates in May of 1983. In late 1983, Yannacone & Associates asked permission to be relieved as MDL lead counsel and class action counsel. Yannacone & Associates cited financial difficulties as the reason for the request. After being thwarted in an attempt to gain control over the litigation, Ashcraft & Gerel withdrew as a member of the Plaintiffs' Management Committee. *See*, Affidavit of Robert A. Taylor, Jr., Exhibit 1, for an accounting of that withdrawal and related matters.

A number of documents released to the news media by Victor J. Yannacone, Jr. (which served in part as the basis for an article by The American Lawyer in April of 1984) call into question the adequacy of MDL and class action counsel. A number of those documents were provided to Ashcraft & Gerel by Mr. Yannacone after he had furnished copies to the media. Some of those documents are to be found as Exhibit 11. A copy of The American Lawyer article is also to be found as Exhibit 12. A **[164]** number of Mr. Yannacone's contemporaneous documents corroborate his statements under oath. Mr. Yannacone's statements under oath and his contemporaneous documents raise serious questions as to the adequacy of class action and MDL lead counsel from the inception of the litigation to May of 1983. The inadequacy which Mr. Yannacone alleges to have existed apparently had an impact on the settlement as seen from Mr. Benton

Musslewhites' Statement Under Oath, a copy of which is found as Exhibit 22. Unless otherwise indicated, the following information was obtained from Mr. Musslewhite's Statement Under Oath. Page citations are to the transcript of that statement.

Mr. Musslewhite first became involved in the Agent Orange litigation in 1979 through Tod Ensign, Counsel for Citizen Soldier, a Vietnam Veterans' organization (p. 5). He joined ranks with Messr. Scotty Baldwin and Melvin Block in representing a large number of Vietnam veterans (pp. 5-6, 7). Yannacone & Associates, however, was established as MDL lead counsel and Mr. Musslewhite anticipated entering into a monitoring status (p. 8). With time, however, Mr. Musslewhite came to recognize that Yannacone & Associates may not have been adequately protecting his clients (p. 8-9). Yannacone & Associates was not purchasing copies of microfilmed documents produced by the government and was not taking depositions (Statement Under Oath By Victor Yannacone, Exhibit 21, pp. 34-37, 59). Consequently, Mr. Musslewhite joined Ashcraft & Gerel in a motion to establish **[165]** a steering committee for the purposes of pretrial discovery. Neither Mr. Musslewhite nor Ashcraft & Gerel moved to be made class or MDL counsel. The motion was solely to establish a steering committee to conduct discovery (pp. 9-10). Of greater importance, Ashcraft & Gerel and Benton Musslewhite recognized the magnitude and expense of the Agent Orange litigation and requested the Court to select counsel from around the country based on their MDL and class action experience and their ability to fund the litigation (p. 10). The Honorable George C. Pratt denied that motion finding that Yannacone & Associates had the skill, desire and financial ability to see the Agent Orange litigation to its end.

In February of 1983, Yannacone & Associates was in such financial troubles and spread so thin that it invited Mr. Musslewhite and Steven Schlegel to become members of a new Plaintiffs' Management Committee. Ashcraft & Gerel

became a member in March of 1983. From February of 1983 to September of 1983, Mr. Musslewhite witnessed the further degeneration of Yannacone & Associates through bitter feuding and financial strangulation (p. 14).

When Ashcraft & Gerel and then Yannacone & Associates withdrew from the Plaintiffs' Management Committee, only Steven Schlegel, Benton Musslewhite and Thomas Henderson, who had been brought aboard only a month earlier, remained. They did not **[166]** have the finances or manpower necessary to continue the litigation. Money and manpower was obtained by entering into a fee sharing and expense reimbursement scheme with six (6) other law firms.

The Plaintiffs' Management Committee's internal expense reimbursement and fee sharing arrangement raises serious questions as to the adequacy of representation afforded by class counsel. A copy of that agreement is found as Exhibit 13. On December 7, 1983, Stephen J. Schlegel, Thomas W. Henderson and Benton Musslewhite, who had been appointed as the Plaintiffs' Management Committee, entered into an agreement with six other attorneys to obtain additional manpower and financing. The agreement was executed only five (5) months before trial was scheduled. Under the terms of the agreement, those who advanced costs of the litigation were to receive three (3) times the amount of money they advanced, prior to the distribution of any other monies. The remainder of the award was to be divided as follows: 50% in equal shares among all committee members, 30% in proportion to hours worked, and 20% based on factors paralleling those considered by Courts in granting fees. "The result would be that those who advanced money would be advantaged to an extraordinary degree over those who gave their time and skill to the enterprise." Memorandum and Order on Attorney Fees And Final Judgment, January 7, 1985, p. 60. Under the terms of the agreement, the new "financiers" controlled a **[167]** majority of the votes. Upon information and belief, only after

settlement negotiations were completed and the case settled did the Plaintiffs' Management Committee divulge to the Court its internal arrangement.

Upon learning of the agreement, the Court was clearly concerned.

> At the hearing on fees, the court indicated that the then-current internal management agreement was unlikely to withstand close scrutiny. Members of the PMC subsequently entered into a new arrangement permitting reimbursement of moneys advanced by a multiple of three and allocation of the rest of the fee awards to those who were awarded them by the court.

Memorandum and Order on Attorney Fees and Final Judgment, p. 63. As the Court properly noted in its Memorandum "[a] division of fees without regard to work performed or responsibility assumed is not 'in compliance with the standard' for fixing fees. *Prandini v. National Tea Co.*, 557 F.2d 1015, 1019 (3rd Cir. 1979). The 'touchstone for the fee [is] to be the actual effort made by the attorney to benefit the class.' *Grinnell II*, 560 F.2d at 1099." *Id.*, at 61 (parenthetical in original). *See also*, ABA Model Rules of Professional Conduct, Code DR 5-103(A).

By May 7, 1984, the day of trial, five (5) of the nine (9) members (a majority) had contributed $200,000 each to the Plaintiffs' Management Committee. Each of the five (5) stood to make $600,000 from a settlement on May 7, 1984. On that date, **[168]** the five (5) financiers' 300% return on investment was without risk. Interestingly, each of the five (5), financiers became involved in the litigation only six months before settlement.

Mr. Musslewhite's Statement Under Oath appears to indicate that an ability of a majority of the Plaintiff's Management Committee to obtain a 300% return on their investment and receive a share of fees for work performed by

others had an adverse impact on settlement negotiations. Mr. Musslewhite has stated under oath:

> I can tell you from statements made to me by Schwartz, he wanted to take the money and run because Newton is always that way. That is one reason I had difficulty sometimes in dealing with Newton in that is the way he is. He doesn't care whether you try a case and win or what. As soon as he thinks a settlement is reasonable and his estimate of what is reasonable is so far below mine, they don't even come close. So Newton is a settling lawyer. He doesn't like to try cases and he doesn't try any cases to speak of. He just settles and runs. (pp. 100-101)
>
> * * *
>
> And I guess if you are asking me: Did the fact that the money situation enter into it, I would say this, John [O'Quinn] has indicated that certainly anybody that says money consideration doesn't enter into a settlement in negotiations would be a liar. So I suppose to some extent it did influence him. But by nature he is not afraid to go try a lawsuit . . . (p. 101).
>
> * * *
>
> **[169]** Now, the others, based on statements made around me, I don't think there is any question but that money considerations entered into it. (p. 102).

Mr. Musslewhite's statements under oath clearly suggest that the Plaintiffs' Management Committees' internal expense reimbursement and fee sharing arrangement adversely affected settlement. Even if the agreement had no effect on the settlement, the appearance of impropriety is so great as to require the Court to vitiate the settlement.

In his statement, Mr. Musslewhite makes known that Stanley Chesley, Gene Locks and Thomas Henderson had no individual clients (p. 99). Newton Schwartz and Robert

O'Quinn only obtained clients or, more appropriately, obtained an interest in the recoveries of certain clients through an agreement to provide financing to Mr. Musslewhite (p. 99). Once Messrs. Chesley, Locks, O'Quinn, Schwartz and Henderson became members of the Plaintiffs' Management Committee and were appointed as class counsel, they had a fiduciary duty to all members of the class. The absence of individual clients was thereafter of no legal consequence. Nonetheless, a lack of individual clients may have adversely affected Mr. Chesley's ability to adequately represent the class in settlement negotiations, with which he was principally charged." In the absence of previously representing individual Vietnam Veterans, their spouses and children, in the absence of experiencing first hand the egregious injuries nobly suffered by those clients, the class members and their injuries may have been mere abstractions **[170]** to Mr. Chesley. Clearly, zealous representation is fostered by a desire to remedy an injustice to persons known by name, face, and who are known to have suffered severe and unjust injury. Stanley Chesley's lack of individual clients before becoming class counsel may have had a detrimental impact on his ability to represent the class during settlement negotiations.

Indeed, Mr. Chesley indicated that he could not try the case because of his active involvement in the Bendectin litigation (p. 65). Mr. Chesley was far too removed from the Vietnam Veterans, their families and *their* litigation to have been chosen to engage in settlement negotiations.

Mr. Musslewhite's statement under oath further indicates that Mr. Chesley's involvement in the Bendectin litigation may also have resulted in Mr. Chesley failing to adequately inform himself of the strengths and weaknesses of the class representatives' cases for the purpose of settlement negotiations (p. 74-77). Like Agent Orange, the Bendectin litigation is a major MDL/class action. Mr. Chesley played a leading role in bringing about a settlement in that litigation which was ultimately overturned on appeal. Like the Agent

Orange litigation, preparation to try the Bendectin case was a 24 hour job. Query, whether Mr. Chesley had sufficient time to prepare the Bendectin case for trial and adequately inform himself of the strengths and weaknesses of the class representatives' cases in the Agent orange litigation.

[171] The agreement making Mr. Chesley a member of the Plaintiffs' Management Committee is dated December 7, 1983 --- only five months before trial was set. Prior to Mr. Chesley becoming a member of the Plaintiffs' Management Committee, over three (3) years of pretrial proceedings and discovery had occurred. There was clearly insufficient time for Mr. Chesley to acquaint himself with that discovery and those proceedings. Indeed, Mr. Musslewhite's statement under oath indicates that it may have been impossible for Mr. Chesley to inform himself of past discovery. According to Mr. Musslewhite, half of the depositions taken in the litigation remained unsynopsized (p. 50). Finally, evidence supporting the inference in Mr. Musslewhite's statement that Mr. Chesley failed to fully inform himself of the strengths and weaknesses of the class representatives' cases is found in Mr. Musslewhite's statement that Mr. Chesley never sat down with him to discuss the strengths and weaknesses of the government contract defense (pp. 76-78).

Mr. Musslewhite was chiefly in charge of defeating the government contract defense at trial. Had Mr. Chesley discussed the defense with Mr. Musslewhite, he would have assured Mr. Chesley that the defense posed little obstacle to a favorable jury verdict (p. 106, 110). Query whether Mr. Chesley negotiated under a misapprehension as to the strength of that defense. To the extent the spectre of that defense was relied upon at the fairness hearings to justify a clearly inadequate settlement, the possibility of a misapprehension on the part of Mr. Chesley is not remote. *See*, Fairness Hearings.

[172] In addition to inadequately informing himself of the strengths and weaknesses of the class representatives'

cases, Mr. Musslewhite has alleged under oath that Mr. Chesley failed to adequately inform himself and then the Plaintiffs' Management Committee of the number and kind of potential claims against any settlement fund (pp. 66-74). *See also*, Exhibit 10, First Supplement To, and Brief In Support of, Motion Filed Under Rule 59 and 60 of F.R.C.P. Concerning The Courts Final Judgment Dated January 7, 1985, pp. 31-35. Mr. Musslewhite has stated under oath:

> Stan Chesley was given the responsibility of ascertaining the number of cases out there . . . (p. 68).
>
> * * *
>
> But to start off with what made settlement so difficult is that the judges had so framed the case over the history of it that nobody knew what was going on as far as the numbers were concerned. (p. 69).
>
> * * *
>
> As I understood it, Judge Pratt was going to conduct the Government's contractors defense trial, then the general liability trial, and the causation trial if the plaintiffs were successful all along that line. (*Id.*)
>
> * * *
>
> So we come up and we are talking settlement in May of 1984 and we don't really have any detailed medical information about any of the clients but Chesley was given the job of finding out the best he could about the numbers. (p. 70).
>
> * * *
>
> Now he came back to us in that week when we finally got him pinned down to talk with us about it. I am not saying he was evasive but he always played this thing close to his vest. He always said: 'It's a big secret. I can't tell you much.'

[173] I didn't know what was going on. We were kept in the dark, frankly until the last week before the settlement.

And he says that 'The best I can tell is there are 20,000 claims out there and about 3 to 4,000 of them are serious.'

And he assured me and I got the impression he had been checking with everybody. I felt sure he had checked with you, Rob and I understand now from you that he had not checked with you about your claims. I felt certain that he had checked with Yannacone who we all knew had a large number of claims and I hear from Victor today -- in fact I heard since the settlement that he had not checked with Victor on the number of claims except for those two conversations that Tom Henderson had had with Victor which was certainly not down to detail. I understood from many other lawyers around the country, particularly regional counsel, that Chesley did not ever call them. Now, who he called, I don't know. I would like to be able to look him in the eye and ask him the question: 'Who did you call and how did you come up with only 20,000 claims of which some of those would be not serious claims, and about only three or four thousand of them would be serious claims?' He was given that responsibility and that's what he reported back to us. (p. 72).

* * *

But the point I am trying to make is, Rob, at the time we were sitting there and started that around-the-clock negotiation on the fatal weekend before May 7, nobody really knew what the real numbers were. Nobody really knew what the true medical information was on the claim and the kinds of claims and the categories of illnesses or maladies.

> The only information we had is what Stan Chesley told us what the best he could do for us was 20,000 claims with 3 to 4,000 of them serious. (pp. 73-74).

Apparently, Mr. Chesley failed in the responsibility he assumed to determine the number of potential claims which might be filed against any settlement fund. Two examples attest to this failure: Mr. Chesley did not check with Mr. Yannacone, who **[174]** represented approximately 8,000 Vietnam Veterans to determine the number and nature of those claims and Mr. Chesley did not check with Robert A. Taylor, Jr. to determine the number or nature of the claims by the 1,000 Vietnam Veterans he represented. *See*, Exhibit 1, Affidavit of Robert A. Taylor, Jr. Had Mr. Chesley checked with Mr. Yannacone or Mr. Taylor, he clearly would have know that there were far more than 20,000 potential claims and that far more than 3,000 to 4,000 serious cases existed.

As of February 28, 1985, the Agent Orange Computer Center had counted 216,000 timely claim forms. Another 5,000 timely forms are expected. In the 214,000 claim forms analyzed, 9,704 cancers, 35,995 miscarriages and stillbirths and 65,037 families with one or more children with birth defects were identified. No figures were available for the number of wrongful death claims, the liver dysfunctions, renal dysfunctions, central and peripheral neuropathies, gastro-intestinal disorders, immune deficiencies and related problems, chloracnes and the psychosomatic problems, to name only a few of the maladies caused by exposure to Agent Orange. Obviously the 216,000+ claim forms received as of February 20, 1985 does not take into account the claim forms to be filed over the next twenty-five (25) years by those who manifest injury after February 2, 1985. They too are entitled to compensation from the settlement fund.

Indeed, it is questionable whether those charged with negotiations had the opportunity to assess the number of claims that might be made over the next twenty-five (25)

years. As discussed, *infra*, the class definition was altered in the settlement agreement *during* settlement negotiations to include **[175]** for the first time those who had not manifested injury. Undoubtedly, those engaged in settlement discussions had no opportunity to consult biostatisticians to determine what might be the expected rate of various diseases in the future given present rates of appearance.

Without an accurate assessment of the number and nature of present and future claims, the Plaintiffs' Management Committee could not have adequately represented the interests of the class. The failure to take steps necessary to make an accurate assessment of the number and nature of present and future claims is fatal to the settlement. The Court may not approve a class action settlement if representation has been inadequate.

Mr. Musslewhite's statement under oath attests to further serious inadequacies of representation. According to Mr. Musslewhite, the Plaintiffs' Management Committee failed to computerize the documents and depositions (pp. 49-52). Indeed, Mr. Musslewhite has stated under oath that on the day of trial only one-half of over 200 depositions had been synopsized (pp. 50, 55). A review of defendants' Proposed Pretrial Orders in conjunction with a list of depositions taken brings to light that on the day trial was to have begun, only 26 of the 81 live medical causation witnesses to be called by the defendants had been deposed. In total, defendants listed 160 live causation witnesses they intended to call at trial. In separate proposed pretrial orders, defendants were to list their live liability witnesses. Settlement removed that obligation. It is unknown how many of defendants' liability witnesses were not deposed.

[176] According the Mr. Musslewhite, documents remained unorganized for purposes of preparing 26(b) statements and, inferentially, for trial. Eight of plaintiffs' 14 liability witnesses were excluded as a result of Mr. Musslewhite's failure to submit complete 26(b) statements (p.

41). According to Musslewhite, he was unable to submit full 26(b) statements because he could not obtain necessary documents from other members of the Plaintiffs' Management Committee (p. 40). Apparently, the documents were unorganized or had not been culled to make them available for 26(b) statements and trial. A call for help may also have indicated a lack of preparations to go to trial.

Ashcraft & Gerel received a call from a member of the Plaintiffs' Management Committee three weeks before the May 7, 1984 trial date, asking the firm to assign Robert A. Taylor, Jr. to work full-time on the Government Contract Defense and requesting partners James Green and Robert Adams to devote as much time as was possible to defeat that defense at the upcoming trial. Though Ashcraft & Gerel had withdrawn from the Plaintiffs' Management Committee in September of 1983, the request seemed urgent enough, and troubling enough in light of the doctrine of *stare decisis*, to cause the firm to begin a shifting of responsibilities to provide the requested aid. Settlement, of course, terminated those activities.

Apparently, the call for help was made by Mr. Musslewhite without authorization by the Plaintiffs' Management Committee. When he advised them of his request, the Plaintiffs' Management Committee voted him down. Why the Plaintiffs' Management **[177]** Committee refused sorely needed help is unclear. Was it a fear that Ashcraft & Gerel would learn the level of preparation to go to trial (p. 46)? The very fact of the call raises a question as to the level of preparedness of the Plaintiffs' Management Committee. Indeed, the extremely low settlement figure raises this same question.

According to Mr. Musslewhite, frantic efforts to prepare for trial exhausted the members of the Plaintiffs' Management Committee (pp. 46-47, 62-64). To be then forced by the Court into a marathon settlement negotiation on

the eve of trial clearly diminished the effective representation of the class. According to Mr. Musslewhite:

> This tactic of Judge Weinstein's had a profound effect on everybody. It really did.
>
> Not only were you tired and not your usual self in terms of resistance of having control, you know, of what was going on but it made you feel kind of helplessness.
>
> * * *
>
> And the Time article or the Newsweek article that commented that the Judge wore us all down with that tactic, that was a very true statement. He did.
>
> Q. Were you engaging in settlement negotiations under - -
>
> A. Duress? Pressure? [Mr. Musslewhite suggesting the right word].

Exhibit 22, pp. 79-81. In addition to wearing down counsel through around-the-clock negotiations, Mr. Musslewhite further suggests that the Court unduly made its intentions known to direct a verdict and to only allow select diseases to go to the **[178]** jury (pp. 83-87). Finally, Mr. Musslewhite's statement under oath indicates that the Plaintiffs' Management Committee was negotiating under two additional misconceptions: 1) that wives and children would receive awards from the settlement fund, regardless of the Court's belief as to a lack of causation evidence (pp. 88-89); and 2) that the settlement fund might be augmented by suit against the government (pp. 90-91). As is now known, the proposed distribution plan disenfranchises the wives and children from any cash awards and the government has been granted summary judgment on the wives' and veterans'

claims.[117] When the above two misassumptions are combined with the alleged failure of the Plaintiffs' Management Committee to take adequate steps to ascertain the number and nature of present and future claims,[118] serious questions as to the adequacy of class counsel's representation are raised. When serious questions as to the adequacy of class counsels' representation are raised, the Court must set aside the settlement.

A large number of serious questions have now been raised. Did Yannacone & Associates refuse to develop proof of causation from September 1979 to May 1983? Statement under oath by Victor Yannacone, Jr., Exhibit 21, pp. 22, 34, 61. Did the Consortium under-staff the litigation? Id., at 31, 39, 42, 54-55, 57. Did **[179]** the Consortium refuse to purchase documents produced by the government? When microfilmed copies of the government's documents were finally purchased, did members of Yannacone & Associates refuse to review them until shortly before the motions for summary judgment? *Id.* at 34-35. Was a single microfilm reviewer sufficient on which to review all the microfilm? *Id.* Did members of the Consortium refuse to review documents produced by the chemical companies until forced by the motions for summary judgment? *Id.* at 35. Did members of the Consortium ignore Mr. Yannacone's repeated requests for aid in reviewing the documents produced by the government and the chemical companies? *Id.* at 37. Was more than one high speed copier needed? *Id.* Did the frequent interdiction of computer services for non-payment harm the litigation?

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[117] By order of February 8, 1985, the Court dismissed the children's claims without prejudice to future suit.

[118] Victor Yannacone has stated under oath that Yannacone & Associates and the Plaintiffs' Management Committee willfully failed to determine the number and nature of claims for fear that a large number of serious claims would make a settlement difficult to achieve. See, Exhibit 21, pp. 83-83.

Id. at 40. Did a lack of significant word processing harm the litigation? *Id.* at 40-41. Did the failure to place any discovery documents on whatever computer existed adversely affect the case? *Id.* at 41-42. Did the members of Yannacone & Associates lack the experience necessary to prepare and try the Agent Orange case? *Id.* at 43. Did the failure to retain consulting experts impair the preparation of the case? *Id.* at 43-44. Did Yannacone & Associates under-fund the case and, if so, did that adversely impact upon preparation and settlement. *Id.* at 44-51. Is the large number of unpaid bills indicative of a failure to adequately fund the litigation and did the failure to pay bills interrupt vital services, e.g., provision of deposition transcripts? *Id.* at 51-53. Did members of Yannacone & Associates fail to review deposition transcripts? *Id.* at 54. Out of approximately 200 depositions, why were more than 10 but **[180]** less than 50 put into the computer? *Id.* at 57-58, 65. Why were most of the depositions taken by defendants. *Id.* at 58-59. Was a decision actually made largely on the basis of costs that no depositions would be taken until after defendants finished all their depositions. *Id.* at p. 59. Did members of the Consortium fail to vest sufficient time to master documents relevant to the government contract defense? *Id.* at 61. Why did Yannacone & Associates fail to cross move for summary judgment on elements one and two of the government contract defense? *Id.* at 65. Did the bitter feuding between the two factions of Yannacone & Associates harm the litigation? Musslewhite Statement, Exhibit 22, pp. 14-15. Why were plaintiffs' counsel asking no questions at depositions and failing to cover elements one and two of the government contract defense. *Id.* at 16. Why was a partial summary judgment granted against plaintiffs on elements one and two of the government contract defense? *Id.* at 17-19. Was it proper to have on the Plaintiffs' Management Committee lawyers who had never represented individual clients? *Id.* at 24. What effect did an absence of individual clients have on the ability of certain members of the

Plaintiffs' Management Committee to represent the class? Why was Peter Johnson's firm not brought into the Plaintiffs' Management Committee and what effect did that have on the litigation? *Id.* at 29-31. Why did the Plaintiffs' Management Committee fail to adequately use the manpower and expertise of members of Yannacone & Associates? *Id.* at 33-34. Why had nothing been done by members of the Plaintiffs' Management Committee to obtain liability witnesses until after December 1983/January 1984. *Id.* at 35-36. Why had **[181]** other members of the Plaintiffs' Management Committee been unable to provide discovery documents necessary to prepare the liability experts and their 26(b) statements? *Id.* at 37. Were eight (8) of fourteen (14) of plaintiffs' liability witnesses excluded because of a failure to submit adequate 26(b) statements? *Id.* at 40-41. What impact did that have on the settlement negotiations? Why did the Court exclude "rational decision makers" within the United States Government from testifying? *Id.* at 42-44. When the Plaintiffs' Management Committee could not use high level witnesses to establish that the government did not have equal or greater knowledge concerning the hazards of Agent Orange, was the Plaintiffs' Management Committee prepared and able to match defendants' lower eschelon witnesses? *Id.* at 44-46, 53-55. Why was Ashcraft & Gerel importuned by Benton Musslewhite to aid him with the government contract defense a few weeks before trial? *Id.* at 44-46. Why was the pretrial statement inadequate and poorly organized? *Id.* at 47-49. Was the plaintiffs' case in an administrative shambles? *Id.* at 49. Why had no computerization of depositions occurred? *Id.* at 49-50. Why were only one-half of all the depositions synopsized in the absence of computerization? *Id.* at 50-51. Did the Plaintiffs' Management Committee unwisely expend its finances by failing to spend on priority items, e.g., computerization and getting all the depositions and documents summarized? *Id.* at 51-52. Did the Plaintiffs' Management Committee overly simplify the cases and, hence, fail to develop appropriate

witnesses? *Id.* at 58. Did personality clashes have a detrimental affect on the litigation? **[182]** *Id.* at 26-29, 60-63. Did Stan Chesley's heavy involvement in the Bendectin litigation have an adverse impact on his ability to prepare for settlement negotiations? *Id.* at 65-66, 74-77. Why were other members of the Plaintiffs' Management Committee not advised of the negotiation level until it had reached a shockingly low $250,000,000? *Id.* at 67-68. Did the Plaintiffs' Management Committee fail to inform itself as to the number and nature of potential claims as a basis for negotiating? *Id.* at 66-74. Did the Plaintiffs' Management Committee purposely fail to determine the number and nature of potential claims against any settlement fund for fear of uncovering such a numerous number of serious claims that settlement would have been made extremely difficult (Victor Yannacone Statement, pp. 83-85). Did the chief negotiator for the plaintiffs ever take the time to fully apprise himself of the strengths and weaknesses of the class representatives' cases (Musslewhite Statement, p. 77.) Given the voluminous amount of discovery which preceded his membership on the Plaintiffs' Management Committee, was it physically possible for the Committee's chief negotiator to digest that discovery in five months to prepare for settlement negotiations? *Id.* at 76-77. Were the members of the Plaintiffs' Management Committee negotiating under conditions of exhaustion? *Id.* at 79-81. Were the members of the Plaintiffs' Management Committee negotiating under duress? *Id.* at 80-81, 87. Did the Court put inappropriate pressure on the plaintiffs negotiators? *Id.* at 81-86. Did an absence of knowledge as to the number and nature of potential claims against the settlement fund adversely affect the settlement? *Id.* at 82-83, 88. Did the Plaintiffs' Management Committee rely to their detriment on **[183]** the Court's statements that by being part of the class, the wives and children would get something? *Id.* at 88-89. Did the Plaintiffs' Management Committee miscalculate that they would have a chance to augment the settlement fund through

suit against the government? *Id.* at 90-93. Were the class action representatives, apprised of the course of negotiations? *Id.* at 94. What effect did an absence of personal clients have on the ability of four members of the Plaintiffs' Management Committee to zealously represent the class? *Id.* at 95, 99. Did the Plaintiffs' Management Committee's chief negotiator or his firm represent Lloyd's of London during the Agent Orange settlement negotiations? *Id.* at 95-98. Did a conflict of interest or an appearance of impropriety exist if Mr. Chesley or his firm represented Lloyd's of London? *Id.* at 95-98. Did the Plaintiffs' Management Committee's internal fee sharing and expense reimbursement agreement, whereby the "financiers" were entitled to three (3) times the amount of money they contributed and to share in the fee awards of others for work the "financiers" had not performed, have an adverse impact on the settlement negotiations? *Id.* at 99-105?

Answers to many of the above questions have been provided by the statements under oath by two former members of the Plaintiffs' Management Committee. *See*, Exhibits 21 and 22. Their answers only raise more questions. The questions which have arisen are alone sufficient for the Court to reconsider its approval of the settlement. At the very least, the Court should allow objectors to the settlement to conduct discovery and establish a record as to the unfairness, unreasonableness and inadequacy of the settlement.

[184] Ashcraft & Gerel renews its motion to have a subclass of objectors certified and to appoint Ashcraft & Gerel as counsel to the subclass for the purpose of conducting discovery as to the reasonableness, fairness and adequacy of the settlement. The Court has a "continuing duty to undertake a stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation (citations omitted)" *In Re General Motors Corp. Enqine Interchange Litigation*, 594 F.2d 1106, 1124 (7th Cir. 1979). Discovery by counsel

representing objectors to the settlement would aid the Court in carrying out that duty.

C. Serious Defects in the Class Action Call For The Settlement to Be Set Aside

1. The Class Definition Is Imprecise

The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is feasible for the court to determine whether a particular individual is a member. The class definition must not be amorphous or imprecise. Consequently, whether a person is a member of a class may not depend on his state of mind or subjective belief. *Ihrke v. Northern States Power Company,* 459 F.2d 566, 573 (8th Cir. 1972); *Jimeniz v. Weinberger,* 523 F.2d 689, 698 (7th Cir. 1975); *cf., In Re Agent Orange Product Liability Litigation,* 100 F.R.D. 718, 728-29 (2nd Cir. 1983). The definition of the class in this case, requires the Court to ascertain a person's state of mind to determine whether that **[185]** person is a class member. The court has to determine whether a person believes that Agent Orange caused his or her injuries.

The Clerk of Court's letter which prefaces the March 19, 1984 Legal Notice To Class Members of Pendancy of Class Action stated: "This lawsuit is a class action on behalf of persons . . . who allege injury." The class also includes spouses, parents and children . . . who *claim* direct or derivative injury . . . (Emphasis added). The actual notice stated:

> 2. The plaintiffs include spouses, parents, and children born before January 1, 1984, of the service persons who *claim* direct or derivative injury as a result of exposure.

In Re Agent Orange Product Liability Litigation, 100 F.R.D. at 731-32 (emphasis added). Similarly, the radio and television notice was styled to catch the attention of those who "claim injury." *Id.* at 734. The newspaper and

magazine notice highlights the state of mind problem. That notice stated:

> If you or anyone in your family *can claim* injury, illness, disease, death or birth defect as a result of exposure to Agent Orange. . .

Id., at 734-35.

Whether one claims (believes) or can claim (capable of believing) that his or her direct or derivative injuries resulted from exposure to Agent Orange is a state of mind. To determine whether one claimed or could have claimed injury as a result of Agent Orange at or before final judgment requires the ascertainment of the person's state of mind. The class definition, hence, is impermissibly imprecise.

[186] 2. The Class Definition Was Improperly Altered After Notice Had Been Sent To the Original Class Members

The class was originally defined in the March 9, 1984 Legal Notice To Class Members of the Pendency of a Class Action as set out in the proceeding section. After the notice had been sent, the Court accepted a settlement agreement which altered the class definition. The altered definition brought into the class for the first time persons who had not manifested injury and children born after January 1, 1984. Page 9 paragraph 8 of the settlement agreement states: "The Class specifically includes persons who have not manifested injury." The original notice failed to advise the original "claiming injury" class members that "noninjury claiming" members and children born after January 1, 1984 would be added to the class. Having permitted such an alteration, the Court failed to provide proper notice, a renewed opportunity to opt-out and to assure that the settlement fund fairly and adequately provided for the new claims. *Weinberger v. Kendrick,* 698 F.2d 61, 70, 77 (2nd Cir. 1982).

3. Notice Was Not The Best Notice Practical Under The Circumstances Including Individual Notice To All Members Who Could Have Been Identified

Through A Reasonable Effort

The fourteenth Amendment guarantees all class members due process of law. An opportunity to be heard is a fundamental **[187]** requisite of due process of law. "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane, Special Guardian v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). Consequently, a notice informing absent class members of the pendency of a class action must be reasonably calculated, under all the circumstances, to apprise them of the pendency of the class action and permit them sufficient time to respond. *Id.*

> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . .(citations omitted) or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Mullane, 339 U.S. at 306. Under the teachings of *Mullane*, written actual notice must be sent to all class members known to the class representatives and to those who can be identified "with due diligence." *Id.* at 317. *Mullane* also suggests that publication notice may be utilized for class members who cannot be identified through a reasonable effort if it is of a "form ...not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Mullane*, at 306. The Supreme Court has made clear, however, that "'[n]otice by **[188]** publication is a poor and sometimes a hopeless substitute for actual service of notice,' and that '[i]ts justification is difficult at best.'" *Schroeder v. City of New York*, 371 U.S. 208, 213 (1962).

Rule 23 (c) (2) of the Fed. R. of Civ. Pro. codifies these constitutional imperatives.

By its terms, Rule 23(c)(2) is applicable to this 23 (b) (3) class action. Rule 23(c)(2) states

> In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may if he desires enter an appearance through his counsel.

Rule 23(c)(2) of Fed. R. of Civ. Pro. The Supreme Court has declared that subdivision (c) (2) expresses an "unambiguous requirement" that "individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 159, 175-76 (1974). (hereafter *Eisen*). If publication notice is to be utilized for those class members who cannot be identified through a reasonable effort, publication of the notice must be the "best practical under all the circumstances" and "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Rule 23 (c)(2); *Mullane*, 339 U.S. at 315.

[189] As set forth *infra*, the District Court failed to direct and the Plaintiffs' Management Committee failed to give the best notice practical under the circumstances.

a. The Court Failed To Direct And The Class Action Representatives Failed To Undertake An Identification Of Class Members Who Could Have Been Identified Through A Reasonable Effort

Since February 1981, the Court and the class representatives have been aware of eight sources of names and addresses of class members. The sources and the reasonableness of their review as part of the identification process is detailed in an affidavit dated January 29, 1981 by Edwin R. Matthews, Esq., counsel to Thompson Chemical Company. *See*, Exhibit 14, Appendix, Defendants' Memorandum of Law On The Issue of Class Certification, filed November 8, 1983, Docket No. 1517, Tab 4. Briefly, the sources and their usefulness in identifying the names and addresses of class members were:

1. Veterans Administration Computer System (VADS)

   Computerized records capable of identifying Vietnam veterans discharged after 1973

2. DD-214 at 58 Regional VA Hospitals

   Written records of Vietnam Veterans who have active files at the VA hospitals, e.g. veterans who are educationally deprived or suffered impairment as a result of the Vietnam conflict.

3. Veterans Administration's Agent Orange Registry

   A computerized record containing the names and addresses of approximately 89,000 Vietnam veterans (as of February 1984, *see*, Docket No. 1870) who requested Agent Orange medical screening by the VA.

4. National Military Personnel Records

   Written records of most of Army's, Navy's, Air Force's and Marine's separated, discharged and **[190]** retired personnel. The records contain DD-214 forms with names and last known addresses at date of separation, discharge or retirement with some updated addresses (24 persons working for one month could identify practically all Vietnam veterans who served in Vietnam.

5. Active and Reserve Duty Records

   Computerized records maintained at Department of Personnel Centers for the Army, Air Force, Navy and Marine Corps of active duty and reserve personnel (the Air Force, Marine Corps. and Army could generate *current address* list within 30-60 days of active personnel who served in Vietnam. The Marine Corps Center estimated that of approximately 190,000 active duty marines, 50,000 served in Vietnam. The Reserve Record Centers estimated that they could generate between 264,000 and 294,000 names and current addresses at nominal cost, e.g. $500 for the Airforce list and $2,000 for the Navy list.)

6. States and Territories Which Paid Cash Bonuses

   Computerized and noncomputerized records of Vietnam veterans who were paid service bonuses by the states and territories. Illinois, Louisiana, Michigan, Missouri, North Dakota, Pennsylvania, Washington and Wisconsin could provide the names and last known addresses of 600,000 veterans who served in Vietnam.

7. 68 Private Veterans Organizations

   Computerized and uncomputerized membership list containing current names and addresses. For example, 750,000 of the American Legion's 2.7 million members are Vietnam-era veterans (not all may have fought in Vietnam).

8. Organizations Formed Specifically Around the Agent Orange Issue

   Computerized and noncomputerized membership list of vietnam veterans.

Id. Perhaps one million out of the 2.4 million Vietnam Veterans could have been identified from the above sources through a reasonable effort. Of the above sources, only the

Veterans Administration's Agent Orange Registry with its 86,000 names is known to have been used to identify class members.

[191] A review of some or all of the above listed sources for names and addresses was clearly a reasonable effort. The class representatives conceded in the Fourth Amended Verified Complaint that it was possible to identify each class member by reference to records maintained in the ordinary course of operations. *See*, Exhibit 6 to Docket No. 1517. As attested to by Mr. Matthew's affidavit, many of the names and addresses are computerized. *See*, Exhibit 14. Furthermore, as a party, the government could have been ordered to conduct the computerized and manual searches with an entitlement to payment for expenses from the class representatives. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356-59 (1974).

Clearly, the effort to identify the names and last known addresses of class members from some, if not all, of the above sources was a reasonable effort.

> [O]nce a 23(b)(3) action has been certified, the name and *last known address* of each class member known to the parties or capable of being identified from business or public records available to them *must be produced* (note omitted). The source or sources providing the greatest number of names and addresses *must be used*. (emphasis added).

In Re: Nissan Motor Corp. Antitrust Litigation, 552 F.2d at 1088, 1098-1100. As in *Nissan*, this Court should turn to *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) to determine the reasonableness of identifying class members from the sources listed above. In *Eisen*, the Supreme Court upheld a district court's finding that, based upon the parties access to computerized records, the names and addresses of 2.2 million class members could be identified through a reasonable effort. **[192]** *Eisen*, 417 U.S. at 175. Relying on *Eisen* and the dictates of *Mullane* and *Schroeder*, the Court in

Nissan found an admittedly "'herculean task'" of *manually* identifying the names and *last known addresses* of class members from 1.7 million dealer registration cards to be a reasonable effort in light of the size of the class action. The Court stated, "*[A] large class requires a large effort.*" *Nissan* at 1100. (Emphasis added). The Agent Orange class dwarfs the class in *Eisen* and *Nissan*. The effort in identifying class members in the Agent Orange case must dwarf the "herculean task" required in *Nissan*.

The class representatives should have obtained the names and last known addresses of all class members whose identity could have been gleaned from computerized records. Sources 1, 5, 6, 7, and 8 set out above contain computerized records. It was the existence of computerized records which, in part, caused the Supreme Court to decide in *Eisen* that the identification of 2.2 million class members was a reasonable effort.

Computers have not always been with us and the requirement of a manual search does not make the identification effort unreasonable. The Court in *Nissan* required the *manual* search of 1.7 million dealer cards to identify class members. *Nissan* at 1096, 1100. Manual searches would be required of sources 2, 4, 6, 7 and 8 above. Only a search of source 4 comes close to properly being characterized as a "herculean task." As the Matthews' affidavit accurately points out, however, 24 individuals over one months time could complete the task at an estimated cost of $30,000. This is a relatively small sum and the Supreme Court in *Eisen* teaches:

> **[193]** There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.

Eisen, 417 U.S. at 176. In addition to failing to use available computerized military and governmental records to identify class members, the class representatives failed to use even available Court records.

The class representatives should have reviewed the caption of each line complaint in MDL 381 to obtain the names and addresses contained thereon. No affidavit attests to that having been done. The class representatives should have reviewed the motions to intervene in *Dowd v. Dow*, 79 C 479 to obtain the names and addresses contained therein. No affidavit was located in the record attesting to such an effort. The class representatives should have contacted counsel for the class members who had filed complaints and requested the names and addresses of their clients. No affidavit attesting to such an effort was located in the record. Ashcraft & Gerel provided to the PMC the names and addresses of its clients shortly after becoming a member of the PMC in March of 1983. From March of 1983 to April of 1984 when notice issued, the PMC never contacted Ashcraft & Gerel to obtain an updated list. During that time, additional clients retained Ashcraft & Gerel and old clients changed addresses.

The class representatives clearly failed to identify class members who could have been identified through a reasonable effort.

[194] b. The Class Representatives Failed To Provide Written Notice To Some Class Members for Whom They Had A Last Known Address

Even more egregious than failing to obtain from the government machine retrievable names and last known addresses, was the failure to give notice to those whose names and addresses had been furnished to them. For example, the state of Massachusetts sent the class representatives a computer tape containing the names and addresses of 157,496 Vietnam veterans. Letter, Docket No. 2535. The class representatives did not send notice to that group. That fact does not appear of record but was conveyed in a telephone conversation to Robert A. Taylor, Jr., Esq. by Robert Laquori, who headed the computer mailing. *See*,

Exhibit 1. The reason given was the arrival of the tape approximately one week before the opt-out deadline of May 1, 1984. *Id.* A letter from the PMC acknowledging receipt of the computer tapes on April 17, 1984 appears to belie that explanation. *See*, Letter, April 18, 1984, Docket No. 2535.

Similarly, the class representatives failed to provide individual notice to 20,000 West Virginia Vietnam veterans for whom they had addressed labels. The State of West Virginia provided the class representatives 28,000 mailing labels to be used to provide West Virginia's Vietnam veterans with notice of the class action. As explained by Robert Laquori in a letter of July 11, 1984 to Chuck Conroy, West Virginia's Agent Orange Assistance Coordinator, only 8,000 of the 28,000 labels were used. *See*, Exhibit 15. All that had to be done was stuff the envelopes and put on the labels. The fact that it was not done **[195]** is indicative of the absence of a desire on the part of the class representatives to give the best practical notice, *including individual notice to those known* or identifiable through a reasonable effort.

Ms. Jan Levin, an attorney with the PMC advised Robert A. Taylor, Jr., a member of the law firm of Ashcraft & Gerel that only 187,600 written notices were sent. *See*, Exhibit 1. The class is estimated to contain 2.4 million Vietnam veterans, their spouses and children. The class could well be in excess of 5 million members. Ms. Jan Levin further advised Robert A. Taylor, Jr. that out of the 187,600 notices mailed, 57,096 were returned as undelivered or undeliverable. *Id. Roughly one-third of all the written notices mailed were not received by class members.* Two explanations were given by Robert Laquori. First, the program he wrote was not 100% efficient in switching the information in the "fields" on the Agent Orange Registry computer tape to the "fields" on his tape. As he explained, the result was that "some of the addresses looked funny." *Id.* Another tape was sent from the State of Wisconsin with 36,389 names on it. According to Mr. Laquori, he believes the names and addresses were bogus and there was a

"conspiracy." *Id.* 30,603 letters addressed using the Wisconsin computer tape were returned as undelivered or undeliverable.

The experience of the Australian and New Zealand class members is particularly sad and has done little for good relations between the United States and the veterans of those countries. The veterans of Australia and New Zealand did not receive the Legal Notice To Class Members of Pendancy of Class **[196]** Action until shortly before and frequently after the May 1, 1984 opt-out deadline. *See*, Transcript of Fairness Hearings in San Francisco.

Standing alone, the class representatives' failure to give individual written notice to those known to them is fatal to the class action. When that fact is combined with a failure to undertake reasonable efforts to identify class members and such a poor record of mailing notice, there can be no question but that the class action must be decertified.

c. The Written Notice Was Defective

Even if the written notice reached a class member, the notice itself was defective. The written notice failed to identify the representative plaintiffs. Representative parties are normally identified in a class action notice. *Newberg on Class Actions* § 24.75, p. 147. Identification of the representatives allows the class members to determine whether their particular situation is represented and their interests therefor protected. In this case, the plaintiffs asserting survival and wrongful death claims and those who had not manifested injury had no class representatives and were not advised of that fact. The lack of representation permitted their claims to be compromised. *See*, *supra*.

The absence of an identification of the class representatives and a lack of specification as to the extent of their representation also caused plaintiffs' counsel great difficulty in advising their clients. *See*, Exhibit 16. Letter from Ronald L. Wolf, Esq. to Honorable Jack B. Weinstein dated **[197]** March 23, 1984, Docket No. 2299. Counsel

could not advise their clients whether their interests were protected by any of the class action representatives.

The notice failed to advise certain types of class members how to opt-out. The notice failed to advise spouses and children of the need to sign separate "Exclusion Request Forms." Perhaps for that reason an estimated 80% of the "Exclusion Request Forms" are signed only by the veterans and not by the spouses and children. While there may be some exceptions, the norm of family life suggests that members of a family prefer to stay together in a lawsuit. The absence of instructions has frustrated that desire. The Court has ruled that the filing of an "Exclusion Request Form" by a Veteran is insufficient to opt his or her spouse or children out of the class action.

d. Publication Notice Did Not Cure The Defects in Written Notice

The defects in sending or in failing to send written notice cannot be cured. The Supreme Court has declared that subdivision (c)(2).expresses an "unambiguous requirement" that "individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen*, 417 U.S. at 175-76. Publication notice may not be used as a substitute when class members are identifiable through a reasonable effort. When used to provide notice to chose who cannot be identified through a reasonable effort, publication notice must be the "best practical under all the circumstances" and "such as one **[198]** desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

Requesting *proprietary* radio and television stations to broadcast the notice as a public service is not the "best practical notice under the circumstances" and clearly is not "such as one desirous of actually informing an absentee might reasonably adopt to accomplish it." According to Ms. Jan Levin, only 70 radio stations in the whole country and *not a single television station* advised the PMC, in

accordance with the Court's request, that the station had broadcast the notice. *See*, Exhibit 1, *see also*, 100 F.R.D. at 730. Clearly, the maxim that one gets what one pays for is applicable here. One desirous of actually informing those who could not be identified through a reasonable effort would have paid for air time. That clearly would have been the best practical notice under the circumstances.

Nor is the publication of an abbreviated notice in the letters section of the *April 30, 1984* edition of Time Magazine the best notice under the circumstances and such as a person desirous of actually informing an absentee might reasonably adopt. A copy of the Time notice is found as Exhibit 17. A class member could have obtained a copy of the April 30, 1984 Time magazine from the stands as early as April 33, 1984. More than likely, he or she would have received the magazine by mail at home shortly before or after May 1, 1984. The deadline for opting out of the class action was May 1, 1984. The notice was abbreviated and required a class member to call an 800 number to obtain through the mail a complete notice. As can be seen from **[199]** the April 4, 1984 letter of Keith D. Snyder, the 800 service had its bad days. *See*, Exhibit 18. If an absentee had seen the Time Magazine notice on April 23, 1984, the earliest day on which it could have been obtained, and immediately called the 800 number, he would have gotten the written notice on *May 23,* 1984, advising him of his right to opt out by *May 1, 1984.* Perhaps most egregious was placing the notice in the letters to the editor section instead of on the sports page; perhaps counsel for those who wished to opt-out would not have then missed the notice.

The Court required notice to be published in only two major newspapers: The New York Times and U.S.A. Today. *In Re Agent Orange Product Liability Litigation,* 100 F.R.D. at 730. Publication of an abbreviated notice in The New York Times and in U.S.A Today is also not the best notice under the circumstances and clearly not such notice as a person desirous of informing an absentee in Peoria, Illinois

would choose. According to official 1980 census figures, Peoria Illinois has 365,864 people in its "standard metropolitan statistical area." *See*, Census of Population, 1980: Illinois; "Characteristics of Inhabitants: Illinois" Table 11, p. 15-50 and "General Population Character, Illinois," p. 15-5. As can be seen from the affidavit found as Exhibit 19, "241 Sunday editions of The New York 'Times are regularly sold in the Peoria, Illinois metropolitan area and 127 daily editions of The New York Times are regularly sold in the Peoria, Illinois metropolitan area." For the purposes of providing notice, U.S.A. Today's circulation is little better. According to the affidavit found as Exhibit **[200]** 20, U.S.A. Today sells on the average 1450 papers a day. Peoria, Illinois is a major metropolitan area. How many New York Times and U.S.A. Todays are sold in Mount Storm West Virginia?

As the hearing on February 6, 1985, Thomas Henderson, a member of the PMC, admitted that class certification notice had been inadequate. Hearing before the Honorable Jack B. Weinstein, February 6, 1985, Tr., pp. 44-45. More importantly, he admitted that the PMC's failure to give adequate notice was one of the reasons why the case was settled for an inadequate sum. *Id.* Those admissions raise serious questions as to the propriety of the settlement. Query, how can class action counsel, who have a fiduciary duty to class members, use their malfeasance as a ground for accepting an inadequate settlement? If the PMC knew that it was incapable of providing constitutional notice, the PMC had a fiduciary responsibility to the class members to request that the class action be decertified. A failure to give adequate notice could not be allowed to adversely affect settlement negotiations, which, according to Mr. Henderson, it clearly did. If the Court knew that class certification notice had been inadequate, it had an absolute duty to require adequate notice or decertify the class action. *Eisen.*

The class action representatives clearly failed to give the best practical notice under the circumstances, including

written notice to those class members who could have been identified through a reasonable effort. Having failed to give constitutionally mandated notice, the class representatives used **[201]** that failure to justify the acceptance of a clearly inadequate, unreasonable and unfair settlement. The Court must decertify the class action and reject the tainted settlement.

4. The Court Had No Jurisdiction Over The Class Action

The class action was based on diversity of citizenship pursuant to 28 U.S.C. § 1332. *In Re Agent Orange Product Liability Litigation,* 635 F.2d 987, 993, *cert. denied,* 454 U.S. 1128 (1981); *cf., In re Diamond Shamrock Chemicals Co.,* 725 F.2d 858, 861 n.2 (2nd Cir. 1984). In a class action based on diversity of citizenship, each member of the class must have a colorable claim of $10,000.00 exclusive of costs and interest. *Zahn v. International Paper Co.,* 414 U.S. 291 (1973). Those class members who have not manifested injury clearly have no colorable claim of at least $10,000.00 in controversy exclusive of costs and interest. The Court is without subject matter jurisdiction.

Under *Snyder v. Harris,* 394 U.S. 332 (1968) and *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356 (1921), complete diversity must exist between the class representatives and the defendants. The Dow Chemical Company has it principal place of business and is incorporated in Midland, Michigan. Danny and Christine Ford, two of the class action representatives were residents of Michigan when the action was filed. In the absence of complete diversity, the Court is without subject matter jurisdiction.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

United States Courthouse
Brooklyn, New York

March 18, 1985
10:00 o'clock a.m.

Before:
HONORABLE JACK B. WEINSTEIN, Chief U.S.D.J.

[Transcript Excerpts]

* * * *

[5] THE COURT: First motion of the defendants to disqualify Ashcraft and Gerel from further representation of any plaintiff in the Agent Orange litigation. I will hear you.

MR. RIVKIN: Your Honor, on behalf of all the defendants, I would urge the motion. It appears without opposition, the facts are the firm of Ashcraft and Gerel represents plaintiffs who have opted out and represents plaintiffs who are taking. They have made a motion to set aside the settlement and they are appealing various items pertaining to the settlement class action.

I submit, sir, I cannot serve two masters. A win on the part of Ashcraft and Gerel on behalf of objecting clients by necessity translates into a loss for their client class members who favor the settlement.

I really do not care to argue it in any depth, because the law is clear, the facts are uncontested, and I would submit they'd have to pull out.

THE COURT: Any response?

MR. MANSULA: I will be speaking only for this limited motion. My name is Wayne Michael Mansula of the law firm of Ashcraft and Gerel. Can I speak from my seat?

THE COURT: Yes, wherever you are comfortable.

MR. MANSULA: Your Honor, I do not feel this motion is --

[6] THE COURT: Excuse me a moment.

(Pause.)

Yes.

MR. MANSULA: I feel the defendants lack standing to make this motion here. This is not the proper forum. But to go the substance, your Honor, I do not believe they have even profited any information about our clients to state whether or not there is a conflict or not.

I can represent to the Court there is no conflict. All our clients are against the settlement at this time. In fact, I do not know of many veterans that are for the settlement.

As far as our veterans are concerned, your Honor, we do not have any. We informed them at the time -- in the early stages when the settlement was first announced -- we had a miniscule number, 3 or 4, that were saying, "protect the settlement," but those have long since changed their minds. We informed them that they had a right to seek out other counsel, because there may be a conflict, but they chose to fight the settlement and not seek counsel. At this time there is no conflict and has not been for many, many, many months.

[7] If you use the defendants argument about the conflict in this whole litigation, because the Plaintiffs Management Committee had been representing different interests and different rights, so as far as our law firm is concerned, we have no clients that are supporting the settlement at this time.

THE COURT: There is clearly a solid basis for the motion. Under the Second Circuit decisions, were there just

a few clients being represented by this law firm, it is clear that the law firm would be disqualified for a conflict of interest. There are many conflicts as related in the defendants papers.

One of the factors that gave the Court pause, when Ashcraft and Gerel asked for attorneys fees in connection with the class action, was based on this conflict where Ashcraft and Gerel took the position that they were not going to support the settlement, they were going to advise the clients to oppose the settlement, and yet they wanted a substantial amount of funds from the settlement.

The Court gave a fee, although it has great reservations about it, and that matter should be taken up by the Second Circuit.

The practical problem here is that were Ashcraft and Gerel disqualified, it is unlikely that any responsible lawyer would undertake the representation **[8]** of these plaintiffs. Ashcraft and Gerel must make a very substantial investment in the case, both for the appeals that are pending, in connection with the motions and other litigation that is going forward. In effect, they have gotten on a tiger that they cannot dismount. It is unlikely that any other reputable attorney would get on that tiger, given the circumstances of this case. So that if the motions were granted, the net effect would be that these plaintiffs would be unrepresented. It seems to me that the second circuit's position with respect to disqualification of attorneys is highly unrealistic in a case like this. Therefore, because of the special circumstances, I am not going to follow the second circuit's general rules on conflict, even though I recognize that there is a substantial conflict here. Motion denied. The second matter on the agenda, appeal of defendants from the magistrate's order directing depositions of Doctors Bardana, Hartung, and Taylor in Lilley versus Dow, and Hogan versus Dow.

Mr. RIVKIN: The magistrate has set forth many items in discovery and timetables which we believe are unrealistic.

Rather than argue facts, I think the problem I am faced with, I must concede at the very

* * * *

[48] as one has characterized, "Engines of destruction."

When this case was brought, there were only 16,000 plaintiffs who filed in the cases. Many of those were not vets, they were wives and children. 16,000 had come forward and filed cases against the chemical companies. Those who filed had local attorneys. They were prepared for trial before local juries. I think there would have been reasonable results, regardless of whether a win or loss, the case would have been adjudicated, and there would have been settlements which the clients would have been familiar and which the clients would have been happy with. Rather the case was certified as class action and an imprecise definition was fashioned. The class was to include all those veterans who were claiming injury, a claim of injury is a subjective state, impossible to determine who was in fact a class member. Having set up an imprecise definition, there was a problem providing notice to all those that might be class members. Having had a chance to review the record on notice, it is my conclusion that notice was horribly inadequate. There were 2.5 million Viet Nam veterans, and an additional number of wives, an additional number of children.

[49] Rule 23(c) provides all those that could have been identified through reasonable efforts should have received a written notice. Out of the 2.5 million veterans, only 187,600 received written notices. Out of that 187,600 written notices sent, 57,096 of those were returned to the sender as being undeliverable or undelivered. That is approximately one third of all written notices, which were sent out, came back as undelivered or undeliverable. The reason given for that was -- comes from Robert LoCurie, the organizer of the computer center run by Plaintiffs Management Committee. He advised me the primary source for names of the mass

mailing was the Agent Orange registry, a computer containing approximately 87,000 names at that time.

It was necessary to write a program which had the capability of changing the information contained in the Agent Orange registry computer tape to his computer tape which required a switch of information from one field to another. In doing so he advised me that the program was not 100 per cent drug free and in his words a number of the addresses that came out of the computer looked a little funny.

In addition one might inquire why only 187,000 written notices were sent out. Was it in fact impossible or unreasonable to identify Viet Nam veterans? Mr. Ed Matthews, a member of the defense bar, filed an affidavit in opposition to certification of this case as a class action. He set out, after substantial research, a number of sources to identify reasonable efforts for a computerized list of approximately over a million names of the Viet Nam veterans who could have and should have received written notice --

[50] THE COURT: Refresh my recollection:

Did you oppose or any of your clients oppose that certification or the notice?

MR. TAYLOR: Contemporaneous with the certification, no your Honor.

Prior to becoming a member of the Plaintiffs Management Committee we did, yes sir.

THE COURT: You did?

MR. TAYLOR: Prior to becoming a member of the Plaintiffs Management Committee, we set out the standards which would be required for proper notice. I would like to refresh my recollection. That was quite a while ago.

THE COURT: I do not recall receiving any opposition from your firm or your clients when these decisions were being made. As you say, it was a long time ago. You say

you recall opposing the certification after the case was assigned to me?

MR. TAYLOR: No, your Honor.

[51] This was prior to that. Just before we became a member of the Plaintiffs Management Committee, we filled terms with respect to -- what was proper with respect to a class action with respect to notice.

THE COURT: None of your clients or you opposed the certification or the notice at the time?

MR. TAYLOR: It was impossible to oppose at that time, because one had no record. Only through a search of the record have we been able not to determine that inadequate notice was sent out.

THE COURT: I see.

MR. TAYLOR: In fact, your Honor, a search of that record brought to our attention the fact that the Plaintiffs Management Committee had been provided approximately 28,000 mailing addresses of West Virginia Viet Nam veterans, which were to be utilized in providing the original class notice to the West Virginia Viet Nam veterans.

All was required to take the mailing label and put it on an envelope and stuff in that envelope the notice and mail it out.

According to documents which are cited in our brief, and also exhibits in the record, only 8,000 of those 28,000 mailing addresses were utilized. In addition to that there was failure to notify people of whom they actually had addresses, not people that had been identified through a reasonable effort, but **[52]** for which they had reasonable addresses. A computer tape was sent from the State of Massachusetts. That computer tape contained a substantial number, approximately 157,000 names and addresses of Viet Nam veterans. Although there is some indication in the record that perhaps those addresses were not as clear as need be for the purposes of service, I was advised by Robert LoCurie that the

Plaintiffs Management Committee instructed him not to send notices to those veterans, although there is indication in the record that the computer takes two weeks before the opt out deadline -- I believe two weeks before the opt out deadline.

There were substantial problems in the giving of written notices and that problem was not cured by radio and TV notice -- constructive notice. I suggest the record clearly indicates that it was not. Your Honor had only required the Plaintiffs Management Committee to provide written notice in the New York Times and USA Today. Contained in our papers are affidavits provided by the circulation directors of USA Today and the New York Times in the Peoria Illinois area. We didn't chose Peoria to be cute. We have clients who live there and it is important to us to know that they would have received, if not the written notice, the media notice. The circulation figures are contained in our papers --

[53] THE COURT: Your clients received no notice of the settlement and no notice of the class?

MR. TAYLOR: We have to identify -- there were a substantial number who received no written notices by the Plaintiffs Management Committee as to the class and their right to opt out --

THE COURT: Your clients received no notice of the class action and the opt out requirements in a timely fashion?

MR. TAYLOR: We have sent a letter to our clients advising them. However, it is not our position -- it is not -- we should not have been placed in the position --

THE COURT: Your clients received notice, did they not?

MR. TAYLOR: Your Honor, we sent a letter. I have to verify with each client that they received that letter.

THE COURT: What standing do they have on this matter, if they in fact received notice?

MR. TAYLOR: Your Honor, I am not representing those opt out clients at this particular time. What I am doing is putting --

THE COURT: Who are you representing, is the question that I started with?

[54] MR. TAYLOR: I am representing our clients who are members of the class, who are in opposition of the settlement. I am seeking to indicate --

THE COURT: Did those clients not receive notice that you are now claiming is defective?

MR. TAYLOR: As I indicated, a letter was sent to them. I'd have to check with each client to see if they received that letter.

THE COURT: Isn't the best way to give notice to an individual, to have a lawyer send a letter to his client?

MR. TAYLOR: That was done without direction of the Court or request of the Plaintiffs Management Committee. In fact, when representing those who are members of a class, one should not be put in the position to have to notify --

THE COURT: I understand what should have happened, according to your contention. I am wondering what your standing is to object to notice, when you say you yourself gave the notice?

MR. TAYLOR: Your Honor, our clients who are in opposition to the settlement, even though they may have received notice, utilized that as only one factor in seeking to have that settlement overturned. Notice was inadequate as to the class.

[55] THE COURT: Are you representing those members of the class who are not your clients in this argument? That is the question that I am putting to you?

MR. TAYLOR: I do not believe I can do that. I'm only representing my clients who are members of the class.

THE COURT: And you did send each one of them written notice in time to opt out?

MR. TAYLOR: That is correct.

THE COURT: With a suggestion that they do opt out?

MR. TAYLOR: That is correct, your Honor.

THE COURT: I see.

MR. TAYLOR: In addition to the newspaper notice your Honor requested that notice be published in a number of magazines -- too. One was Time Magazine. Through some snafu the Time Magazine article -- the Time Magazine issue, which contained that notice, contained the date April 30, 1983, which your Honor may recall the date for opting out was one day later, May 1 of 1983. From receiving Time Magazine at home I recognize Time is frequently dated one week in advance of the time members would have received that at their homes. One weeks time would have been insufficient amount of time, assuming the veterans received Time Magazine at their home, to have contacted the Plaintiffs Management Committee, had them **[56]** mail to them a full class action notice, having done so to return that to the Plaintiffs Management Committee, or to the computer center. Nor was the problem of notice cured by the utilization of either radio or TV. I have executed an affidavit which you will find in my papers indicating that I spoke with Ms. Jan Levian, whom I note to be a staff attorney with the Plaintiffs Management Committee, and she advised me that only approximately 70, 80 radio stations had filed certificates indicating that the notice had been broadcast across the country. There are thousands of radio stations. Only 70 indicated that they had broadcast the notice and not a single television station indicated that they had broadcast the notice.

Subsequently, at least in my opinion, written notice was defective. The news media, paperprint news media notice was inadequate, and clearly was insufficient notice and utilization of TV or radio.

At the very minimum, it was not the type of notice that the cases require, that one chose that type of notice which one would chose if they were desirous of notifying those that

cannot be identified through reasonable efforts. Had the Plaintiffs Management Committee been desirous of notifying those that could not be identified through reasonable efforts, they should have

* * * *

[70] the veterans leaders throughout the land, as the affidavit of Mr. Todd Ensign, attached to my third supplement to Rule -- to my Rule 59 motion, attests and I could assure this Court one thing, the overwhelming majority of the Vietnam veterans feel that this message that you are entitled to nothing so take the charity we give you, is the ultimate indignity in a long line of seemingly never ending indignities. They do not want a handout, they do not want insulting charity, and they do not want something for nothing.

If under our system of justice they are entitled to nothing, they want nothing. The veterans, your Honor, for once agree with the New York Times view that it would be better if this, and all complex class action cases were "decided not on their costs but on the merits."

(continued on next page)

* * * *

[75] you, your Honor, to the plaintiffs causation memorandum prepared by Tom Henderson, filed with the Court, particularly pages 72-79. In short, each case will have to stand on its own feet and the conclusions as to whether a prima facie case has been made may vary from claimant to claimant.

Therefore, the Court, I would respectfully suggest, could not possibly say that the plaintiffs could not have proven a prima facie case with at least some of those cases.

As to punitive damages, about as shocking as the Court's view, the five representative plaintiffs, did not have a jury question on medical causation was the view that there would be no jury question with respect to punitive damages.

Here, again, as with medical causation of the representative plaintiffs, the Court makes this arbitrary assessment without having heard the evidence. This Court is fully familiar with the evidence that the plaintiffs had in hand of a meeting of the defendant chemical companies or most of them wherein they conspired to keep the knowledge that the Agent Orange contained a highly dangerous and toxic contaminant from the Court and from the Veterans of the United States. They did that knowing the contaminant in question, Dioxin, was one

* * * *

[81] mankind to preserve this infinite planet from toxic poisons and waste pollution.

Your Honor, I wrote this poem. It goes something like this, "Through this tossing world, the last ones and only repast, is in justice we may show our fellow suffering man, let us do it while we can, not delay it. It is plain we shall not pass this way again."

I give you that poem because I believe we're now at the apex of this case. What has gone on before is not going to be as important as what is now, what comes in the future. I'm afraid it's not going to be as important as right now.

The world is watching your Honor. These Veterans are watching. Members of the Armed Forces are now watching to see how we treat the Vietnam Veterans. The lawyers who might bring suit beneficial to all of our society are watching. And the victims of poisoning by pollution everywhere all over the world is watching. This is an important case. I know the Court recognizes this.

I feel very much like the man on death row who is about to have his last meal. I'm afraid to have that meal because I know what's going to happen next. I'm afraid to sit down because I'm afraid I know what's going to happen when I sit down.

All I can say in closing, your Honor, please **[82]** don't precipitously refuse what these Veterans so solemnly asked you to do. You have the power under Rule 59, Rule 60 to amend and alter. We're not asking you at this time that you precipitously bring down the final hammer. Say the settlement is set aside. All we're asking as we say in our papers, is let these Veterans now that they have been fully informed, they know what approximately what the distribution plans call for, they have a pretty good idea what the total number of claims are, now that they can make a true and fair intelligent assessment of what they want to do, give them that freedom of choice, give them that right to stay in or stay out of this settlement.

That's all we ask, your Honor.

THE COURT: Thank you. The Court has carefully considered your argument and your papers. Your motions are, in all respects denied; no costs or disbursements.

Julio Gonzalez. Who are you appearing for?

MR. GONZALEZ: On behalf of my family and myself I hereby make a formal motion to set aside the tentative settlement and if you were to go ahead, if you were to go ahead with the settlement, that you would allow my family and I and those Veterans involved the opportunity now that we know what the hell is going on for the first time. Give us this opportunity to either stay in or opt out.

* * * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE
"AGENT ORANGE"
PRODUCT LIABILITY LIGTIGATION

No. 84-6273*

Appeal from Orders of the
United States District Court for
the Eastern District of New York

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*84-6273, 84-6321, 85-6035, 85-6051
85-6083, 85-6261, 85-6265, 85-6301
85-6303, 85-6307, 85-6323, 85-6325
85-6327, 85-6329, 85-6335, 85-6349
85-6371, 85-6373, 85-6379, 85-6381
85-6385, 85-6387, 85-6393, 85-6395, 85-6411

REPLY BRIEF OF APPELLANTS
(Objectors to the Class Action Settlement)
(Reply to Chemical Companies' Brief_

[Excerpts]

* * * *

[15] The Chemical Companies note that many individual suits filed elsewhere were multidistricted to the Eastern District of New York for pretrial purposes. The pertinence of that assertion is unclear, for the multidistricted cases were all dismissed and it is a separate, class action suit that is here on appeal. Are the Chemical Companies arguing that, whenever one is multidistricted to a distant state for pretrial purposes under 28 U.S.C. 1407, he is then deemed to be there for all purposes and may be subject to personal jurisdiction in any

matter whatsoever? The Chemical Companies cite no authority for that proposition; nor can they, for the proposition is so violative of traditional notions of personal jurisdiction to be devoid of precedent as well as of reason.[7]

The *Erie Railroad-Arrowsmith* line of cases and the usurpation-of-legislative-power proposition put forth in the Appellants' Main Brief are completely ignored. We suggest that the reason is clear: neither the PMC nor the Chemical Companies were successful in finding any authority or any line of reasoning to the contrary, based upon our legal system, the separation of powers between judiciary and legislature, and the balance between federal and state authority in diversity cases long settled by *Erie Railroad* and by *Arrowsmith*. On these grounds alone, reversal is required.

F. Notice. The Chemical Companies' argument on notice is most perplexing. Clearly, no one knew how many persons who served **[16]** in Vietnam had been exposed to Agent Orange, had manifested injury from Agent Orange or would manifest such injury in the future, or who they were. All that was known as [sic] that they were within the 2.4 million persons who served in Vietnam. A notice sent to each of those persons who could be found, plus extensive publication, would insure that notice reached al persons possible who were included in the class. The Chemical Companies object to sending notice to this "overinclusive group" (Br. 37). But they do not complain about sending notice to an *underinclusive* group, as admittedly was done here. We respectfully suggest that this attitude—which permits the wiping out of thousands of personal, individual claims without notice—because of the desire not to furnish notice to an "overinclusive group" of all those who were in a position to be exposed to Agent Orange is indicative of the

[7] The Chemical Companies of course do not even attempt to explain the pertinence of the multidistricted cases to those persons swept into the class who had not been a party to a multidistricted case.

callous attitude of the Appellees toward the members of the class involved in this case.

The Chemical Companies tell this Court (Br. 38) that available lists (the VADS files and lists of Navy and Marine service persons) did not include the names and addresses of veterans discharged before 1973 and Air Force Reserve records go back only into the early of mid 70s: But Chemical Companies furnish no reason not to use the lists for those who were on it. Apparently, here underinclusiveness, which the Chemical Companies seem to champion elsewhere, is wrong. The Chemical Companies tell us that money spent searching government files would produce only an underinclusive list. Somehow, we respectfully submit, the logic that it is better to give no notice to those persons than it is to give notice to **[17]** those who could be found appears to be lacking: certainly it is not supplied by the Chemical Companies.

The issue appears to come down to whether it is reasonable to spend money to find the names and addresses of all possible class members before their individual, personal causes of action are wiped out. The Chemical Companies would say no. To them it is more reasonable to wipe out individual, personal causes of action without notice than to spend the funds necessary to find the members of the class that, by the Chemical Companies' own admission (Br. 38) are findable from available lists. That, we respectfully suggest, is not due process, and is not sustainable under *Mullane v. Hanover Bank*, 339 U.S. 306 (1950), or *Eisen v. Carlisle*, 417 U.S. 156 (1974). Moreover, it runs directly contrary to the Supreme Court's most recent holding in *Phillips Petroleum v. Shutts*, 105 S.Ct. 2965 (1985), where only those persons actually notified were included in the class.

Counsel for the Chemical Companies do tell us, however, that "by 1983, virtually all Vietnam veterans who were concerned about possible exposure to Agent Orange

undoubtedly were included by the Veterans Administration on the Agent Orange Registry or were aware of the class action." Br. 35. We respectfully submit that this unsworn testimony by counsel is not worthy of a case of this importance, of this Court, or the stature of counsel. Moreover, it ignores the record. One need only look at the affidavits filed by the *Eddelmon* group of veteran to see that many veterans did not

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JOE ISAACSON and PHYLLIS LISA ISAACSON, his wife Plaintiffs	SUPERIOR COURT OF NEW JERSEY LAW DIVISION OCEAN COUNTY
v.	DOCKET NO:
DOW CHEMICAL COMPANY; MONSANTO COMPANY; AMERICAN HOME PRODUCTS, INC.; HERCULES, INCORPORATED; THOMPSON HAYWARD CHEMICAL CO.; T-H AGRICULTURE & NUTRITION CO.; OCCIDENTAL CHEMICAL CORPORATION; UNIROYAL, INC.; C.D.U. HOLDING, INC.; UNIROYAL CHEMICAL COMPANY; HARCROS CHEMICALS INC; ULTRAMAR DIAMOND SHAMROCK CORPORATION, MAXUS ENERGY CORP, and CHEMICAL LAND HOLDINGS, INC. AND DOES 1 THROUGH 100 Defendants	**CIVIL ACTION COMPLAINT**

PLAINTIFFS

1. The Plaintiffs are Joe Isaacson and his wife Phyllis Lisa Isaacson, who reside at 308 Ashford Road, Toms River, New Jersey. Joe Isaacson ("Plaintiff") served in Vietnam during the hostilities from 1968 to 1969 where he served as a crew chief for the 615 attack fighter squadron stationed at Phang Rang. While he was in Vietnam, he was exposed to the Defendants' product, Agent Orange herbicides with dioxin contamination, and sustained various injuries alleged herein.

DEFENDANTS

2. Defendant Dow Chemical Company is a Delaware corporation with its principal place of business in Midland, Michigan.

3. Defendant Monsanto Company is a Delaware corporation with its principal place of business in St. Louis Missouri.

4. Defendant American Home Products, Inc. is a Delaware Corporation with its principal place of business in New Jersey.

5. Defendant Hercules Incorporated is a Delaware corporation with its principal place of business in Wilmington, Delaware.

6. Defendants Thompson Hayward Chemical Co. a/k/a Thompson Chemical Corporation and T-H Agriculture & Nutrition Company are Delaware corporations with its principal places of business in Kansas City, Kansas.

7. Defendant Occidental Chemical Corporation is a New York corporation with its principal place of business in Dallas, Texas.

8. Defendants Uniroyal, Inc., C.D.U. Holding, Inc. and Uniroyal Chemical Company are New Jersey corporations with their principal places of business in Middlebury Connecticut.

9. Defendant Harcros Chemicals Inc. is a Delaware corporation with its principal place of business in Kansas City, Kansas.

10. Ultramar Diamond Shamrock Corporation, Chemical Land Holdings, Inc. and Maxus Energy Corporation are related corporations with their principal place of business in San Antonio, Texas.

11. Defendants Does 1 through 100 are other corporations which presently cannot be identified who directly or through their corporate predecessors or subsidiaries manufactured, marketed, distributed and sold Agent Orange.

ACTS OF DEFENDANTS

12. During the period of 1961 to 1972 each of the corporate Defendants designed, manufactured, marketed, distributed and sold to the United States Government the phenoxy herbicides (hereinafter collectively described as Agent Orange herbicides), known as Agent Orange, Orange II, Purple, Pink and Green, and whose basic component formulations were:

a. Agent Orange was a 50/50 mixture of the n-butyl esters of 2,4-D and 2,4,5-T (2,4,5-tricholorophenoxyacetic acid);

b. Agent Orange II was a 50/50 mixture of the isooctyl ester of 2,4,5-T and the n-butyl ester of 2,4-D;

c. Agent Purple was a 50/30/20 by weight mixture of the n-butyl ester of 2,4,-D, n-butyl ester of 2,4,5-T and isobutyl ester of 2,4,5-T;

d. Agent Pink was a 60/40 by weight mixture of n-butyl ester of 2,4,5-T and the isobutyl ester of 2,4,5-T;

e. Agent Green was a single component formulation consisting of n-butyl of 2,4,5-T.

13. The Agent Orange herbicides manufactured and sold by the Defendants to the United States Government for use in Vietnam during the aforesaid period contained deadly toxic contaminants including dioxins which were inherently dangerous to human health and capable of causing severe injuries to persons exposed thereto, one of which dioxins is the most toxic and deadly, that being 2,3,7,8-tetrachlorodibenzo para dioxin, more commonly referred to as "TCDD" or "dioxin".

14. Each Defendant's Agent Orange herbicides, as so supplied to the military for use in Vietnam contained the toxic contaminant dioxin, was defective, and unreasonably dangerous to the plaintiff.

INJURY TO PLAINTIFF

15. As direct and proximate results of the acts described above, the Plaintiff was caused to suffer grievous, serious, and severe injuries, and sustained serious and permanent injuries to his health, strength and activity, and severe shock to his nervous system, including but not limited to non-Hodgkin's lymphoma, which perforated his colon and involved the small bowel, requiring a resection of the right colon and terminal ileum, constant diarrhea and was caused to suffer and will continue to suffer physical injuries and mental pain, a loss of earnings and impairment of future earning capacity.

16. As a further proximate result of the defendants' wrongful conduct, plaintiff was required to, and did, employ physicians and surgeons to examine, treat and care for him, and plaintiff incurred, and will incur, hospital, medical and other and additional incidental expenses.

17. As a further proximate result of the defendants' wrongful conduct, wife plaintiff was deprived of her husband's services, companionship and consortium.

COUNT I

PRODUCT LIABILITY

Strict Liability in Tort

DESIGN DEFECT

18. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraph.

19. During the period from 1961 to 1972 each of the Defendants designed, manufactured, and sold the United States Government the contaminated Agent Orange herbicides known as dioxin.

20. At all times herein mentioned, the Defendants had a duty to make a safe product and breached that duty by designing and manufacturing the Agent Orange herbicides which were defective and unreasonably dangerous.

21. But for the design defect of the Defendants, the Plaintiff would not have sustained his injuries.

22. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the plaintiff.

23. As actual and proximate results of the Defendants' defective products, the plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

24. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to Plaintiff.

Strict Liability in Tort

INADEQUATE WARNING

25. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

26. During the period from 1961 to 1972 each Defendant designed, manufactured, and sold to the United States Government the contaminated Agent Orange

herbicides for use in Vietnam by Plaintiff and persons in his position.

27. The Defendants had a duty to give warnings as to the danger of their products and breached that duty by manufacturing the Agent Orange herbicides without such adequate warning, rendering their products defective and unreasonably dangerous.

28. The Plaintiff had no reason to expect or anticipate that the Agent Orange herbicides would cause such severe harm.

29. The Defendants did not give an adequate warning as to the danger of the defective products either to the United States Government Officials responsible for decision to deploy the Agent Orange herbicides or to the Plaintiffs who were at risk from the danger of the defective products.

30. But for the inadequate warning of the Defendants, the Plaintiff would not have sustained his injuries.

31. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the Plaintiff who was a foreseeable victim.

32. As actual and proximate results of the Defendants' inadequate warning, the Plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

33. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to Plaintiff.

COUNT II

BREACH OF WARRANTY

Breach of Implied Warranty

34. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

35. Each Defendant impliedly warranted the merchantability of the Agent Orange herbicides which they

supplied to the Government and that such herbicides would be reasonably fit for the purpose of defoliating the jungles, for which they were to be used by the military in Vietnam, and that they were relatively non-toxic to human beings and animals.

36. Each Defendant breached its implied warranty of merchantability in that the Agent Orange herbicides it supplied to the Government were not reasonably fit for the purposes for which they were to be used, especially so because of the presence of the toxic contaminant dioxin. Each Defendant breached it implied warranty that the Plaintiff exposed to such herbicides would be safe from personal injuries due to such exposure in that such exposure did in fact cause or contribute to the Plaintiff's serious injuries as hereinbefore alleged.

37. But for the Defendants' breach of their implied warranty, the Plaintiff would not have sustained his injuries.

38. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Plaintiff.

39. As actual and proximate results of the Defendants' breach of their express warranty, the Plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

40. By reason of the Defendants' breach of their express warranties, the Defendants are individually, jointly and severally liable for the Plaintiff's injuries and responsible for and must pay the Plaintiff's special, general, compensatory and punitive damages.

COUNT III

Negligence

DESIGN AND PRODUCTION

41. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

42. During the period from 1961 to 1972 each Defendant designed, manufactured, and sold to the United States Government the contaminated Agent Orange herbicides.

43. The Defendants had a duty to make safe product and breached the duty by manufacturing the Agent Orange herbicides that were defective and unreasonably dangerous.

44. Each corporate Defendant negligently designed and produced Agent Orange herbicides it supplied to the United States Government for use in Vietnam in that each Defendant:

a. Failed to design its herbicides so that they were free from the toxic contaminant dioxin;

b. failed to follow reasonable manufacturing methods and procedure that would avoid the formation of or eliminate the toxic contaminant dioxin;

c. failed to test the Agent Orange herbicides to insure that they were free from the toxic contaminant dioxin.

45. The Defendants owned or controlled virtually all of the Agent Orange herbicide market and product capacity and supplied to the military, the sole source purchaser, over 99% of the herbicides contracted for, and received over 99% of the purchase price.

46. Each Defendant's herbicide was toxic and harmful to human health and contaminated with dioxin in varying degrees.

47. But for the defective design of the Defendants, the Plaintiff would not have sustained his injuries.

48. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the Plaintiff who was a foreseeable victim.

49. As actual and proximate results of the Defendants' negligent design, the Plaintiff was exposed to the

Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

50. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfesors to pay such damages to the Plaintiff.

CLAIMS UNDER NEGLIGENCE

First Claim: Breach of Duty to Warn as to the Defendants' Products

51. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

52. The Defendants, individually and collectively, knew or should have known of the following:

a. That dioxin, its extreme toxicity, its presence in the manufacturing process and the herbicides themselves, and variables determining levels of dioxin in the chemical herbicides' manufacturing process, and its existence in the herbicides, created a substantial risk to human health;

b. That exposure to the herbicides would be harmful to humans by reason of historical experiences involving occupation related injuries to workers following exposure to dioxin-contaminated materials in Defendants' manufacturing facilities in addition to substantial scientific information in the Defendants' possession, custody and control, evidencing the extreme toxicity of such material;

c. That the levels of dioxin contamination in the herbicides manufactured for use in Vietnam could be reduced by the use of appropriate analytical and detection procedures, coupled with alternative and careful methods of manufacturing or quality control and that the

Defendants could have eliminated the substantial risk to human health involved in the use of the herbicides in Vietnam;

d. That the Defendants already had information in the form of judgments and assessments of the risks to health;

e. That the deployment and use of the herbicides manufactured by the Defendants in Vietnam could and would cause substantial adverse affects to persons who were exposed to the herbicides.

53. That during the period of 1961 to 1972, the United States Government officials responsible for the decision to deploy the Agent orange herbicides in Vietnam did not know about the aforesaid types of information with respect to Agent Orange herbicides' manufacturing processes, dioxin as contaminant, detection and risk reduction methods, and health hazards associated with human exposure to such herbicides.

54. During the period from 1961 to 1972, the Defendants had a duty to but failed to warn and share with the Government and the Plaintiff, the aforesaid information which the Defendants knew or should have known with respect to the Agent Orange herbicides they were supplying to the United States Government for use in Vietnam.

55. During the period from 1961 to 1972, the Defendants also knew that the dioxin contaminated Agent Orange herbicides which they were supplying to the Government would be contained in drums unmarked with any corporate identification and mixed together with other contaminated Defendants' products before being sprayed in Vietnam.

56. By reason of the Defendants' failure to warn the Government and the Plaintiff of the health hazards accompanying the use of the dioxin contaminated Agent Orange herbicides being sold to the Government, and by

reason of the Defendants' failure to share with the Government and the plaintiff all they or any of them knew or should have known with respect to the Agent Orange manufacturing process, dioxin as contaminant and detection and risk reduction methods, the Government's resulting ignorance affected not only what was put in or omitted from the contract specifications, but also the standards applied to determine whether each Defendant's product conformed to the specification.

57. By reason of each Defendant's breach of its duty to warn and to share such information with the Government and military, the Government and military were prevented from:

a. making an informed decision not to use a particular Defendant's dioxin contaminated herbicides.

b. imposing protective safety measures in connection with the use of Agent Orange herbicides in Vietnam; or prescribing their use in a manner that would have protected the risk of exposure to the military servicemen;

c. providing exposed soldiers prophylactic medical examinations and treatment to avert or mitigate injuries caused by such exposure; and

d. deciding not to use such herbicides in the Vietnam conflict whatsoever, or, alternatively, to sharply curtail their use in a limited fashion designed to prevent human exposures to injuries.

58. Each of the Defendant's failure to warn the responsible Government and military officials and to share its information as above alleged prevented the military and Government from taking the actions described in the above paragraphs.

59. But for the negligent failure of the Defendants to warn, the Plaintiff would not have sustained his injuries.

60. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Plaintiff.

61. As actual and proximate results of each Defendant's breach of its aforesaid duties, the plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries, diseases, physical disorders and irritations, for which the plaintiff is entitled to and seeks to recover monetary damages from the Defendants.

62. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to the Plaintiff.

Second Claim: Breach of Duty to Warn as to the other Defendants' Products

63. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

64. Each Defendant knew or should have known that the other Defendants were manufacturing and selling to the military dioxin contaminated Agent Orange herbicides for use in Vietnam during the period 1961 and 1972.

65. Each Defendant knew or should have known that the Agent Orange herbicides being supplied by other defendants to the military for use in Vietnam were dangerous to human health.

66. Each Defendant knew or should have known that the other Defendants failed to warn the Government and/or the Plaintiff as to the health hazards associated with the use of their products and that the other Defendants had also failed to share with the Government and/or with the Plaintiff what they knew or should have known with respect to the Agent Orange manufacturing processes, dioxin as a contaminant and detection and risk reduction methods.

67. Each Defendant knew or should have known that none of the barrels of Agent Orange they sold to the government contained any company identifying marks, and

that the Agent Orange herbicides shipped to Vietnam would be mixed and sprayed without discrimination as to which Defendant's product was being utilized and that the Plaintiff would be exposed to such dioxin contaminated herbicides and would suffer the injuries complained of.

68. Each Defendant's breach of its duty to warn and to share with the Government and/or with Plaintiff the information with respect to the other Defendants' dioxin contaminated herbicides, the health hazards associated therewith and the means of detection, risk avoidance and risk reduction, was a substantial factor in preventing the military from taking the action described in Paragraph.

69. The Defendants failure to warn as to the other Defendants' defective products was a substantial factor in bringing about the harm the Plaintiff suffered.

70. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the Plaintiff who was a foreseeable victim.

71. As actual and proximate results of each Defendant's breach of its aforesaid duties, the plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries, diseases, physical disorders and irritations, for which the plaintiff is entitled to and seeks to recover monetary damages from the Defendants.

72. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to the Plaintiff.

CLAIMS UNDER FRAUD AND MISREPRESENTATION

73. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

74. Each Defendant knew its product was hazardous to human health and contaminated. Each Defendant knew that the other Defendants' herbicides were hazardous and contaminated with dioxin. None of the Defendants warned

the uninformed, less expert, military, or informed it either of the toxicity of the herbicides or of the dioxin contamination and the means of its avoidance or elimination.

75. The Defendants instead falsely and fraudulently represented to the United States Government Officials, conspired and acted in concert secretly and persistently to deceive the military and other governmental agencies about the matters hereinbefore alleged through misrepresentations, suppression and withholding of information and other schemes.

76. The Defendants knew that each other's herbicides were dangerous to human health and contaminated with dioxin; that each other's products constituted a breach of duty to warn, and that each was negligent in the design and production of the Agent Orange herbicides being supplied to the government or use in Vietnam and that exposure to such herbicides could and would cause injuries to the Plaintiff.

77. The Defendants concurrently, with their conspiracy of concealment and failure to warn the military as hereinbefore alleged, misrepresented the safety of their herbicides to the military and other Government agencies. Despite its extensive knowledge of health hazards, a Defendants, Dow Chemical Company, misrepresented to the United States military that they had been manufacturing 2,4-D and 2,4,5-T for over ten years and to the best of their knowledge, none of the workmen in their factories have shown any ill effects as a result of working with these chemicals.

78. During the years 1966 and 1967, at times when all Defendants were selling dioxin contaminated herbicides to the military, they formed a Joint Industry Task Force, under the auspices of the National Agricultural Chemicals Association, an organization owned, operated, managed and controlled by the chemical industry whose purpose was to declare Defendant's Agent orange herbicides to be toxicologically safe. During the period of its existence, the

Defendants' Task Force misrepresented to and deceived the Government concerning the nature and the extent of the toxicological data as to hazards which was locked within the Defendants' confidential files.

79. The Defendants and each of them knew of health hazards associated with exposure to such herbicides and each of them during the period in question either made affirmative statements misrepresenting material facts concerning such hazards or willfully did not disclose such material facts by conscious and willful omission.

80. By reason of the Defendants' such misrepresentations, the military and the Government were lulled into a belief that the Defendants' Agent Orange herbicides were safe to human health, and the military was prevented from taking the actions described in the above Paragraphs.

81. The Agent Orange herbicides manufactured by the Defendants were not produced in accordance with military specifications set forth in their Government contracts.

82. The Government contracts, pursuant to which the Defendants manufactured their Agent Orange herbicides, did not order, request, or put limitations on any permissible level of the toxic contaminant dioxin. The herbicides produced by the Defendants were generally similar except that they contained varying degrees of the toxic contaminant dioxin. The Defendants jointly controlled all of the manufacturing processes used in the production of the Agent Orange herbicides supplied to the military.

83. Each of the Defendants' products was defective and dangerous to human health, especially in view of the presence of the toxic contaminant dioxin.

84. By reason of the foregoing, each Defendant is individually, jointly and severally liable for the injuries suffered by the Plaintiff and is responsible for and must pay all special, general, compensatory and punitive damages.

CLAIMS FOR PUNITIVE DAMAGES

85. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

86. Each Defendant knew or had reason to know not only that its conduct and the other Defendants' conducts created an unreasonable risk of harm to the Plaintiff but also that such harm was substantially certain to occur. Nevertheless, each Defendant proceeded with its conduct in reckless or conscious disregard of such consequences to the Plaintiff.

87. As actual and proximate results, the Plaintiff suffered the injuries complained thereof, and is entitled to punitive damages, in addition to special, general, and compensatory damages.

88. Wherefore, the Plaintiff demands judgment of the "corporate Defendants" THE DOW CHEMICAL COMPANY, MONSANTO CO., HERCULES INCORPORATES, T-H AGRICULTURE & NUTRITION COMPANY, OCCIDENTAL CHEMICAL CORPORATION, UNIROYAL, INC., and HARCROS CHEMICALS, INC. AND DOES 1 THROUGH 100, for the following relief:

a. Judgment in such sums as this Court and jury shall find in favor of the Plaintiff as shall fully, adequately and completely compensate him for all usual and customary elements of damage awardable in cases of personal injuries, both general and special, including but not limited to physical pain and mental suffering, past, present and future, the reasonable and necessary costs of medical and hospital services and treatments, past, present and future, loss of earnings, disabilities, disfigurements, loss of society, consortium, services and companionship, and all other recognized losses, costs and damages incurred by the Plaintiff, his wife, his family

and next of kin with direct and derivative claims;

b. Judgment in favor of the Plaintiff and for his punitive damages in an amount to be determined by the Court and jury of sufficient magnitude to adequately punish Defendants and each of them, jointly and severally, by reason of their willful and wrongful conduct and the great magnitude of damages which it has wrought;

c. Together with such other and further relief as to this Court shall seem just and proper under the circumstances, plus interest, reasonable counsel fees and the costs and disbursements of this action.

Respectfully submitted,

Dated: _____

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOE ISAACSON and PHYLLIS LISA ISAACSON, his wife	Hon. Anne E. Thompson
Plaintiffs	Civil Action No.: 3-98cv03988
v.	AMENDED COMPLAINT
DOW CHEMICAL COMPANY, MONSANTO COMPANY; AMERICAN HOME PRODUCTS, INC.; HERCULES, INCORPORATED; THOMPSON HAYWARD CHEMICAL CO.; T-H AGRICULTURE & NUTRITION CO.; OCCIDENTAL CHEMICAL CORPORATION; UNIROYAL, INC.; C.D.U. HOLDING, INC.; UNIROYAL CHEMICAL COMPANY; HARCROS CHEMICALS INC; ULTRAMAR DIAMOND SHAMROCK CORPORATION, MAXUS ENERGY CORP, and CHEMICAL LAND HOLDINGS, INC. AND DOES 1 THROUGH 100	[FILED: Sept. 10, 1998]

Defendants

PLAINTIFFS

1. The Plaintiffs are Joe Isaacson and his wife Phyllis Lisa Isaacson, who reside at 308 Ashford Road, Toms River, New Jersey. Joe Isaacson ("Plaintiff") served in Vietnam during the hostilities from 1968 to 1969 where he served as a crew chief for the 615 attack fighter squadron stationed at Phang Rang. While he was in Vietnam, he was exposed to the Defendants' product, Agent Orange herbicides with dioxin contamination, and sustained various injuries alleged herein.

DEFENDANTS

2. Defendant Dow Chemical Company is a Delaware corporation with its principal place of business in Midland, Michigan.

3. Defendant Monsanto Company is a Delaware corporation with its principal place of business in St. Louis Missouri.

4. Defendant American Home Products, Inc. is a Delaware Corporation with its principal place of business in New Jersey.

5. Defendant Hercules Incorporated is a Delaware corporation with its principal place of business in Wilmington, Delaware.

6. Defendants Thompson Hayward Chemical Co. a/k/a Thompson Chemical Corporation and T-H Agriculture & Nutrition Company are Delaware corporations with its principal places of business in Kansas City, Kansas.

7. Defendant Occidental Chemical Corporation is a New York corporation with its principal place of business in Dallas, Texas.

8. Defendants Uniroyal, Inc., C.D.U. Holding, Inc. and Uniroyal Chemical Company are New Jersey corporations with their principal places of business in Middlebury Connecticut.

9. Defendant Harcros Chemicals Inc. is a Delaware corporation with its principal place of business in Kansas City, Kansas.

10. Ultramar Diamond Shamrock Corporation, Chemical Land Holdings, Inc. and Maxus Energy Corporation are related corporations with their principal place of business in San Antonio, Texas, and manufactured Agent Orange in New Jersey.

11. Defendants Does 1 through 100 are other corporations which presently cannot be identified who directly or through their corporate predecessors or subsidiaries manufactured, marketed, distributed and sold Agent Orange.

ACTS OF DEFENDANTS

12. During the period of 1961 to 1972 each of the corporate Defendants designed, manufactured, marketed, distributed and sold to the United States Government the phenoxy herbicides (hereinafter collectively described as Agent Orange herbicides), known as Agent Orange, Orange II, Purple, Pink and Green, and whose basic component formulations were:

a. Agent Orange was a 50/50 mixture of the n-butyl esters of 2,4-D and 2,4,5-T (2,4,5-tricholorophenoxyacetic acid);

b. Agent Orange II was a 50/50 mixture of the isooctyl ester of 2,4,5-T and the n-butyl ester of 2,4-D;

c. Agent Purple was a 50/30/20 by weight mixture of the n-butyl ester of 2,4,-D, n-butyl ester of 2,4,5-T and isobutyl ester of 2,4,5-T;

d. Agent Pink was a 60/40 by weight mixture of n-butyl ester of 2,4,5-T and the isobutyl ester of 2,4,5-T;

e. Agent Green was a single component formulation consisting of n-butyl of 2,4,5-T.

13. The Agent Orange herbicides manufactured and sold by the Defendants to the United States Government for use in Vietnam during the aforesaid period contained deadly toxic contaminants including dioxins which were inherently dangerous to human health and capable of causing severe injuries to persons exposed thereto, one of which dioxins is the most toxic and deadly, that being 2,3,7,8-tetrachlorodibenzo para dioxin, more commonly referred to as "TCDD" or "dioxin".

14. Each Defendant's Agent Orange herbicides, as so supplied to the military for use in Vietnam contained the toxic contaminant dioxin, was defective, and unreasonably dangerous to the plaintiff.

INJURY TO PLAINTIFF

15. As direct and proximate results of the acts described above, the Plaintiff was caused to suffer grievous, serious, and severe injuries, and sustained serious and permanent injuries to his health, strength and activity, and severe shock to his nervous system, including but not limited to non-Hodgkin's lymphoma, which was manifested and diagnosed less than two years before commencement of this action and which perforated his colon and involved the small bowel, requiring a resection of the right colon and terminal ileum, constant diarrhea and was caused to suffer and will continue to suffer physical injuries and mental pain, a loss of earnings and impairment of future earning capacity.

16. As a further proximate result of the defendants' wrongful conduct, plaintiff was required to, and did, employ physicians and surgeons to examine, treat and care for him, and plaintiff incurred, and will incur, hospital, medical and other and additional incidental expenses.

17. As a further proximate result of the defendants' wrongful conduct, wife plaintiff was deprived of her husband's services, companionship and consortium.

COUNT I

PRODUCT LIABILITY

Strict Liability in Tort

DESIGN DEFECT

18. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraph.

19. During the period from 1961 to 1972 each of the Defendants designed, manufactured, and sold the United States Government the contaminated Agent Orange herbicides known as dioxin.

20. At all times herein mentioned, the Defendants had a duty to make a safe product and breached that duty by designing and manufacturing the Agent Orange herbicides which were defective and unreasonably dangerous.

21. But for the design defect of the Defendants, the Plaintiff would not have sustained his injuries.

22. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the plaintiff.

23. As actual and proximate results of the Defendants' defective products, the plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

24. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to Plaintiff.

Strict Liability in Tort

INADEQUATE WARNING

25. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

26. During the period from 1961 to 1972 each Defendant designed, manufactured, and sold to the United States Government the contaminated Agent Orange herbicides for use in Vietnam by Plaintiff and persons in his position.

27. The Defendants had a duty to give warnings to the United States Government of the danger of their products and breached that duty by manufacturing the Agent Orange herbicides without such adequate warning, rendering their products defective and unreasonably dangerous.

28. The Plaintiff had no reason to expect or anticipate that the Agent Orange herbicides would cause such severe harm.

29. The Defendants did not give an adequate warning as to the danger of the defective products either to the United States Government Officials responsible for decision to deploy the Agent Orange herbicides or to the Plaintiffs who were at risk from the danger of the defective products.

30. But for the Defendants' failure to provide adequate warnings to the United States Government, the Plaintiff would not have sustained his injuries.

31. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the Plaintiff who was a foreseeable victim.

32. As actual and proximate results of the Defendants' inadequate warning, the Plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

33. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to Plaintiff.

COUNT II

BREACH OF WARRANTY

Breach of Implied Warranty

34. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

35. Each Defendant impliedly warranted the merchantability of the Agent Orange herbicides which they supplied to the Government and that such herbicides would be reasonably fit for the purpose of defoliating the jungles, for which they were to be used by the military in Vietnam, and that they were relatively non-toxic to human beings and animals.

36. Each Defendant breached its implied warranty of merchantability in that the Agent Orange herbicides it supplied to the Government were not reasonably fit for the purposes for which they were to be used, especially so because of the presence of the toxic contaminant dioxin. Each Defendant breached it implied warranty that the Plaintiff exposed to such herbicides would be safe from personal injuries due to such exposure in that such exposure did in fact cause or contribute to the Plaintiff's serious injuries as hereinbefore alleged.

37. But for the Defendants' breach of their implied warranty, the Plaintiff would not have sustained his injuries.

38. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Plaintiff.

39. As actual and proximate results of the Defendants' breach of their express warranty, the Plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

40. By reason of the Defendants' breach of their express warranties, the Defendants are individually, jointly and severally liable for the Plaintiffs injuries and responsible for

and must pay the Plaintiff's special, general, compensatory and punitive damages.

COUNT III

Negligence

DESIGN AND PRODUCTION

41. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

42. During the period from 1961 to 1972 each Defendant designed, manufactured, and sold to the United States Government the contaminated Agent Orange herbicides.

43. The Defendants had a duty to make safe product and breached the duty by manufacturing the Agent Orange herbicides that were defective and unreasonably dangerous.

44. Each corporate Defendant negligently designed and produced Agent Orange herbicides it supplied to the United States Government for use in Vietnam in that each Defendant:

a. Failed to design its herbicides so that they were free from the toxic contaminant dioxin;

b. failed to follow reasonable manufacturing methods and procedure that would avoid the formation of or eliminate the toxic contaminant dioxin;

c. failed to test the Agent Orange herbicides to insure that they were free from the toxic contaminant dioxin.

45. The Defendants owned or controlled virtually all of the Agent Orange herbicide market and product capacity and supplied to the military, the sole source purchaser, over 99% of the herbicides contracted for, and received over 99% of the purchase price.

46. Each Defendant's herbicide was toxic and harmful to human health and contaminated with dioxin in varying degrees.

47. But for the defective design of the Defendants, the Plaintiff would not have sustained his injuries.

48. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the Plaintiff who was a foreseeable victim.

49. As actual and proximate results of the Defendants' negligent design, the Plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

50. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfesors to pay such damages to the Plaintiff

CLAIMS UNDER NEGLIGENCE

First Claim: Breach of Duty to Warn

as to the Defendants' Products

51. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

52. The Defendants, individually and collectively, knew or should have known of the following:

a. That dioxin, its extreme toxicity, its presence in the manufacturing process and the herbicides themselves, and variables determining levels of dioxin in the chemical herbicides' manufacturing process, and its existence in the herbicides, created a substantial risk to human health;

b. That exposure to the herbicides would be harmful to humans by reason of historical experiences involving occupation related injuries to workers following exposure to dioxin-contaminated materials in Defendants'

manufacturing facilities in addition to substantial scientific information in the Defendants' possession, custody and control, evidencing the extreme toxicity of such material;

c. That the levels of dioxin contamination in the herbicides manufactured for use in Vietnam could be reduced by the use of appropriate analytical and detection procedures, coupled with alternative and careful methods of manufacturing or quality control and that the Defendants could have eliminated the substantial risk to human health involved in the use of the herbicides in Vietnam;

d. That the Defendants already had information in the form of judgments and assessments of the risks to health;

e. That the deployment and use of the herbicides manufactured by the Defendants in Vietnam could and would cause substantial adverse affects to persons who were exposed to the herbicides.

53. That during the period of 1961 to 1972, the United States Government officials responsible for the decision to deploy the Agent orange herbicides in Vietnam did not know about the aforesaid types of information with respect to Agent Orange herbicides' manufacturing processes, dioxin as contaminant, detection and risk reduction methods, and health hazards associated with human exposure to such herbicides.

54. During the period from 1961 to 1972, the Defendants had a duty to but failed to warn and share with the Government, the aforesaid information which the Defendants knew or should have known with respect to the Agent Orange herbicides they were supplying to the United States Government for use in Vietnam.

55. During the period from 1961 to 1972, the Defendants also knew that the dioxin contaminated Agent Orange herbicides which they were supplying to the Government would be contained in drums unmarked with any corporate identification and mixed together with other contaminated Defendants' products before being sprayed in Vietnam.

56. By reason of the Defendants' failure to warn the Government of the health hazards accompanying the use of the dioxin contaminated Agent Orange herbicides being sold to the Government, and by reason of the Defendants' failure to share with the Government all they or any of them knew or should have known with respect to the Agent Orange manufacturing process, dioxin as contaminant and detection and risk reduction methods, the Government's resulting ignorance affected not only what was put in or omitted from the contract specifications, but also the standards applied to determine whether each Defendant's product conformed to the specification.

57. By reason of each Defendant's breach of its duty to warn and to share such information with the Government and military, the Government and military were prevented from:

a. making an informed decision not to use a particular Defendant's dioxin contaminated herbicides.

b. imposing protective safety measures in connection with the use of Agent Orange herbicides in Vietnam; or prescribing their use in a manner that would have protected the risk of exposure to the military servicemen;

c. providing exposed soldiers prophylactic medical examinations and treatment to avert or mitigate injuries caused by such exposure, and

d. deciding not to use such herbicides in the Vietnam conflict whatsoever, or, alternatively, to sharply curtail their use in a limited fashion

designed to prevent human exposures to injuries.

58. Each of the Defendant's failure to warn the responsible Government and military officials and to share its information as above alleged prevented the military and Government from taking the actions described in the above paragraphs.

59. But for the negligent failure of the Defendants to warn, the Plaintiff would not have sustained his injuries.

60. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Plaintiff.

61. As actual and proximate results of each Defendant's breach of its aforesaid duties, the plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries, diseases, physical disorders and irritations, for which the plaintiff is entitled to and seeks to recover monetary damages from the Defendants.

62. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to the Plaintiff.

Second Claim: Breach of Duty to Warn as to the other Defendants' Products

63. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

64. Each Defendant knew or should have known that the other Defendants were manufacturing and selling to the military dioxin contaminated Agent Orange herbicides for use in Vietnam during the period 1961 and 1972.

65. Each Defendant knew or should have known that the Agent Orange herbicides being supplied by other defendants to the military for use in Vietnam were dangerous to human health.

66. Each Defendant knew or should have known that the other Defendants failed to warn the Government as to the

health hazards associated with the use of their products and that the other Defendants had also failed to share with the Government what they knew or should have

CLAIMS UNDER FRAUD AND MISREPRESENTATION

73. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

74. Each Defendant knew its product was hazardous to human health and contaminated. Each Defendant knew that the other Defendants' herbicides were hazardous and contaminated with dioxin. None of the Defendants warned the uninformed, less expert, military, or informed it either of the toxicity of the herbicides or of the dioxin contamination and the means of its avoidance or elimination.

75. The Defendants instead falsely and fraudulently represented to the United States Government Officials, conspired and acted in concert secretly and persistently to deceive the military and other governmental agencies about the matters hereinbefore alleged through misrepresentations, suppression and withholding of information and other schemes.

76. The Defendants knew that each other's herbicides were dangerous to human health and contaminated with dioxin; that each other's products constituted a breach of duty to warn, and that each was negligent in the design and production of the Agent Orange herbicides being supplied to the government or use in Vietnam and that exposure to such herbicides could and would cause injuries to the Plaintiff.

77. The Defendants concurrently, with their conspiracy of concealment and failure to warn the military as hereinbefore alleged, misrepresented the safety of their herbicides to the military and other Government agencies. Despite its extensive knowledge of health hazards, a Defendants, Dow Chemical Company, misrepresented to the United States military that they had been manufacturing 2,4-D and 2,4,5-T for over ten years and to the best of their

knowledge, none of the workmen in their factories have shown any ill effects as a result of working with these chemicals.

78. During the years 1966 and 1967, at times when all Defendants were selling dioxin contaminated herbicides to the military, they formed a Joint Industry Task Force, under the auspices of the National Agricultural Chemicals Association, an organization owned, operated, managed and controlled by the chemical industry whose purpose was to declare Defendant's Agent orange herbicides to be toxicologically safe. During the period of its existence, the Defendants' Task Force misrepresented to and deceived the Government concerning the nature and the extent of the toxicological data as to hazards which was locked within the Defendants' confidential files.

79. The Defendants and each of them knew of health hazards associated with exposure to such herbicides and each of them during the period in question either made affirmative statements misrepresenting material facts concerning such hazards or willfully did not disclose such material facts by conscious and willful omission.

80. By reason of the Defendants' such misrepresentations, the military and the Government were lulled into a belief that the Defendants' Agent Orange herbicides were safe to human health, and the military was prevented from taking the actions described in the above Paragraphs.

81. The Agent Orange herbicides manufactured by the Defendants were not produced in accordance with military specifications set forth in their Government contracts.

82. The Government contracts, pursuant to which the Defendants manufactured their Agent Orange herbicides, did not order, request, or put limitations on any permissible level of the toxic contaminant dioxin. The herbicides produced by the Defendants were generally similar except that they contained varying degrees of the toxic contaminant dioxin.

The Defendants jointly controlled all of the manufacturing processes used in the production of the Agent Orange herbicides supplied to the military.

83. Each of the Defendants' products was defective and dangerous to human health, especially in view of the presence of the toxic contaminant dioxin.

84. By reason of the foregoing, each Defendant is individually, jointly and severally liable for the injuries suffered by the Plaintiff and is responsible for and must pay all special, general, compensatory and punitive damages.

CLAIMS FOR PUNITIVE DAMAGES

85. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

86. Each Defendant knew or had reason to know not only that its conduct and the other Defendants' conducts created an unreasonable risk of harm to the Plaintiff but also that such harm was substantially certain to occur. Nevertheless, each Defendant proceeded with its conduct in reckless or conscious disregard of such consequences to the Plaintiff.

87. As actual and proximate results, the Plaintiff suffered the injuries complained thereof, and is entitled to punitive damages, in addition to special, general, and compensatory damages.

88. Wherefore, the Plaintiff demands judgment of the "corporate Defendants" THE DOW CHEMICAL COMPANY, MONSANTO CO., HERCULES INCORPORATES, T-H AGRICULTURE & NUTRITION COMPANY, OCCIDENTAL CHEMICAL CORPORATION, UNIROYAL, INC., and HARCROS CHEMICALS, INC. AND DOES 1 THROUGH 100, for the following relief:

a. Judgment in such sums as this Court and jury shall find in favor of the Plaintiff as shall fully, adequately and completely compensate him for all usual and customary elements of damage

awardable in cases of personal injuries, both general and special, including but not limited to physical pain and mental suffering, past, present and future, the reasonable and necessary costs of medical and hospital services and treatments, past, present and future, loss of earnings, disabilities, disfigurements, loss of society, consortium, services and companionship, and all other recognized losses, costs and damages incurred by the Plaintiff, his wife, his family and next of kin with direct and derivative claims;

b. Judgment in favor of the Plaintiff and for his punitive damages in an amount to be determined by the Court and jury of sufficient magnitude to adequately punish Defendants and each of them, jointly and severally, by reason of their willful and wrongful conduct and the great magnitude of damages which it has wrought;

c. Together with such other and further relief as to this Court shall seem just and proper under the circumstances, plus interest, reasonable counsel fees and the costs and disbursements of this action.

Respectfully submitted,

Dated: 9/17/98

/s/ Mark R. Cuker
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[FILED Dec. 29, 2001]

For further information contact:
Deborah Greenspan, Special Master 202-962-9283

Deadline for Application to Agent Orange Payment Program Extended

Brooklyn, New York, December 29, 1994 -

United States District Court Judge Jack B. Weinstein today ordered an extension of the deadline for Vietnam Veterans to file applications to the Agent Orange Veteran Payment Program, the program established to distribute a portion of the proceeds of the Agent Orange Settlement Fund. The Payment Program will now accept all applications submitted with a postmark date of January 17, 1995. Applications must be submitted to P.O. Box 110, Hartford, CT, 06104. To obtain an application, veterans should contact the Payment Program at 1-800-225-4712. The Claims Administrator has expanded the number of telephone lines and operators to accommodate incoming calls and has extended the hours of operation through the end of December from 8 am. until 12 midnight.

The Payment Program was established by Court order in 1985, and commenced operations in 198[illegible] after the conclusion of appeals. The Program had originally been scheduled to conclude its operations as of December 31, 1994. That deadline had been widely publicized both through direct communications to the class and various informational materials distributed to the print and radio media, veterans groups and various public agencies, both throughout the operation of the Program and more recently during 1994. Nevertheless, the Court has concluded that due to the fact that a number of applications were submitted during the last weeks of the Program and due to the fact that a number of inquiries were received by the Payment Program in the last week of 1994, the deadline should be extended to

permit those who have only recently decided to apply for benefits to submit their application materials.

The Agent Orange Payment Program is a benefits program established in 1985 solely to distribute the proceeds of the Agent Orange Settlement Fund. It has no relationship to programs operated by the Department of Veterans' Affairs or programs operated by other governmental agencies. Pursuant to statute and regulation, veterans may continue to apply to the Department of Veterans Affairs for various benefits offered to certain Vietnam veterans claiming exposure to Agent Orange. Veterans interested in such programs should contact their local Department of Veterans Affairs office. The National Veterans Legal Services Program, a Program established by the Agent Orange Settlement Fund, has published a "Self-Help Guide on Agent Orange". Vietnam veterans and their families may obtain that guide free of charge by writing to NVLSP, 2001 S Street, N.W., Suite 610, Washington, D.C. 20009.

The Agent Orange Class Assistance Program, the Program established to distribute another portion of the Agent Orange Settlement Fund for the benefit of the families and children of Vietnam veterans will continue operations through the middle of 1996.

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re Agent Orange
Product Liability Litigation

MDL 381
[Filed: Dec. 22, 1994]

Order

In accordance with previous Orders of this Court, the Agent Orange Veteran Payment Program is scheduled to accept for processing all applications submitted to that Program postmarked December 31, 1994, and to deny as untimely any applications postmarked after that date. This deadline was publicized in all communications to class members and in releases issued to the media and to veterans organizations and other public service agencies since the order establishing the Program in 1985. The class was further notified of this deadline in direct communications to individual applicants to the Program and through the media and veterans organizations during 1994. Nevertheless, during the last week of 1994, the Claims Administrator of the Payment Program has received substantial requests for application materials from class members who had not previously sought to contact the Payment Program. The Payment Program has also received a substantially greater volume of inquiries than expected and although the Claims Administrator has increased its staff and the number of incoming telephone lines, the Claims Administrator has advised that a number of individual callers have been unable to reach the Program as the year end approaches in order to request an application kit.

In light of these circumstances, the Court has concluded that the deadline for submission of applications forms should be extended for a modest period of time to permit those who

have only recently decided to apply to the Program to submit their application materials. It therefore Ordered that the deadline for submission of applications to the Agent Orange Veteran Payment Program shall be extended so that the Program shall accept for processing all applications submitted with a postmark dated on or before January 17, 1995.

So Ordered.

Dated: December 29, 1994

/s/ Jack B. Weinstein
Jack B. Weinstein
United States District
Judge

[Jack B. Weinstein letterhead]

[handwriting: "Sample"]
[stamp: Sep 11, 1998]

September 4, 1998

Mrs. [redacted]
[redacted] Avenue
[redacted]

RE: MDL 381 Agent Orange Veteran Payment Program John Stanton, Jr. - Deceased Veteran

Dear Mrs. [redacted]:

I have your letter postmarked August 19, 1998. The Agent Orange Settlement Fund distribution program about which you inquired has ended and the Fund has been fully allocated.

If you feel that your husband's difficulties were related to the use of Agent Orange, I suggest that you read the enclosed Self-Help Guide and consider applying for benefits from the Department of Veteran Affairs (VA). The Guide contains a list of those who provide representation before the VA. You may wish to contact the authors of the Self-Help Guide at the address listed on the back cover if your husband was a Vietnam veteran who suffered from a disease the VA recognizes as related to Agent Orange (these diseases are listed in the enclosed Guide) or if you are a surviving family member of a Vietnam veteran who died from one of these diseases. They should be able to provide you with further advice about entitlement to VA benefits.

Please accept my best wishes for the future.

Sincerely yours,

/s/ Jack B. Weinstein
Jack B. Weinstein
Senior United States
District Judge

Enc.
F&D A.O.
CC: Special Master

For further information contact:
Deborah Greenspan —202-962-9283
Dennis Rhoades —202-289-6173

FOR IMMEDIATE RELEASE

United States District Court Announces Plan for Terminating the Operations of the Agent Orange Settlement Fund

August 10, 1994, Brooklyn, N.Y.—United States District Court Judge Jack B. Weinstein today announced the plan for concluding the distribution activities of the Agent Orange Settlement Fund. Based on that plan, the Agent Orange Settlement Fund will accept applications for payment from individual veterans and survivors of deceased veterans through December 31, 1994. The Settlement Fund will continue to fund grant programs of agencies providing specified services for Vietnam veterans until June, 1996.

The Agent Orange Settlement Fund was created by the settlement in May of 1984 of the Agent Orange Product Liability Litigation, a class action lawsuit brought by Vietnam veterans and their families against the chemical companies that manufactured certain herbicides used by the United States Armed Forces during the Vietnam War. The action was settled for the aggregate sum of $180 million. Distribution of the Settlement Fund assets began in 1989, after the conclusion of all appeals to the settlement.

The Court established two programs to distribute the Fund to and for the benefit of Vietnam veterans in the United States. The Agent Orange Veteran Payment Program was established to provide cash compensation to totally disabled veterans and to survivors of deceased veterans. Since its inception, the Payment Program has distributed approximately $163 million (including principal and earnings) to over 37,500 veterans and survivors. At the time the Payment Program concludes, it is expected to have

distributed approximately $181 million to over 42,000 class members.

The Agent Orange Class Assistance Program was established to provide grant awards to organizations providing services for the benefit of Vietnam veterans and their families. The goal of the Class Assistance Program was to provide monies to fulfill service needs of the Vietnam veteran community not being met by existing service networks. The emphasis of the Class Assistance Program is on providing monies for programs of benefit to the children of Vietnam veterans and on creating a national network of assistance and informational programs. Since it began its grant-making activities, the Class Assistance Program has distributed grants totalling $57.7 million to 84 different agencies operating in all 50 states plus Washington, D.C. and Puerto Rico. The various service programs supported by these grants have provided direct benefits for an estimated 180,000 veterans and families of veterans. By the time it concludes, the Class Assistance Program will have distributed a total of $70 million in grants.

The monies allocated to the Payment Program and the Assistance Program will be distributed for the benefit of the plaintiff class members. No monies will be returned to the chemical companies or retained by the Court for any purpose. Accordingly, by the end of 1996, all settlement monies, including all earnings of the Settlement Fund should be fully disbursed. It is anticipated that by the time of its conclusion, the Settlement Fund will have distributed, in total, approximately $269.8 million consisting of $181 million in cash payments through the Payment Program, $70 million in grant awards through the Class Assistance program, $5 million to the trusts established in Australia and New Zealand and $13.8 million in fees to plaintiffs' attorneys. By the time the Fund is fully disbursed, administrative costs incurred in distributing and managing the Fund's assets are expected to equal approximately 9 percent of the amount distributed.

The Agent Orange Veteran Payment Program will accept for processing all completed applications submitted with a postmark of December 31, 1994. All applications submitted timely will be reviewed and considered for payment. To obtain an application or information about the Program, veterans may call toll free 1-800-225-4712 (from 8 a.m. to 6 p.m. Eastern Time). Class members may also write to the Payment Program at P.O. Box 110, Hartford, CT 06104. The Payment Program is expected to complete the processing of all applications received by the deadline no later than June 1995. The Payment Program may have a need to contact individuals who have in the past received payment from the Payment Program. Any such individuals should contact the Payment Program if they have moved.

The plan for terminating the distribution of the Settlement Fund calls for the creation of a permanent archive of the records of the Payment Program and the Class Assistance Program. It is the recommendation of the Court-appointed Board of Advisors of both Programs (consisting of Vietnam veterans) that the information collected during the operation of these programs should be preserved and stored in a manner that will permit access to both class members and the public, as appropriate. The information collected provides a wealth of knowledge about the Vietnam veteran population that may prove beneficial to the Vietnam veteran community.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE "AGENT ORANGE" PRODUCTS LIABILITY LITIGATION

DOCKET NO. 381

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, personally came and appeared :

DANIEL RAYMOND STEPHENSON

Daniel Raymond Stephenson, a person of the full age of majority, residing at Lafayette, Louisiana, who, being first duly sworn by me, did depose and state that:

1. I was unaware that I had been harmed by dioxin compounds to which I was exposed during the Vietnam War until after I was diagnosed with multiple myloma on February 19, 1998.

2. I was not aware of the existence of a class action lawsuit on behalf of Vietnam veterans exposed to "Agent Orange" until after I contacted an attorney to discuss this matter in early 1999.

3. I have never received any notice of the pendency of a class action lawsuit on behalf of Vietnam veterans exposed to "Agent Orange" either by direct mail or by publication of notice in print, radio or television media.

4. I have never received any notice of a settlement of a class action on behalf of Vietnam veterans exposed to "Agent Orange" either before court approval of said settlement or afterward. I was in no way advised of the effect said settlement would have on my rights to bring a claim [2] in

the future. I was in no way advised of my right to object to the terms of said settlement. I was in no way advised that I was a member of said class action or of my right to opt out of said class action. Only after I contacted an attorney in connection with this matter in early 1999 did I become aware of the existence of such a settlement.

/s/ Daniel Raymond Stephenson
DANIEL RAYMOND STEPHENSON

Sworn to and Subscribed before
me on this 21st day of May, 1999.

/s/ Gail [N.?] Miller
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK X

MICHAEL F. RYAN, et al.,

Plaintiffs,

-against- 79 CV 747 (JBW)

DOW CHEMICAL COMPANY, et al.

Defendants. X

In re

"AGENT ORANGE" MDL NO. 381

Product Liability Litigation X

JOE ISAACSON, et al.

Plaintiffs,

-against- Civ. No. 98-6383 (JBW)

DOW CHEMICAL COMPANY, et al.

Defendants. X

DANIEL RAYMOND STEPHENSON,

Plaintiffs,

-against- Civ. No. 99-3056 (JBW)

DOW CHEMICAL COMPANY, et al.

Defendants. X

NOTICE OF MOTION FOR DISMISSAL WITH PREJUDICE

Please take notice that on the 13th day of December, 1999 at 10:00 a.m. in the motion part of this Court to be held in the United States Courthouse for the Eastern District of New York, Defendants The Dow Chemical Company, Monsanto Company, Hercules Incorporated, Occidental Chemical Corp., Ultramar Diamond Shamrock Corp., Maxus Energy Corp., Chemical Land Holdings, Inc., T-H Agriculture & Nutrition Co., Inc., Thompson Hayward Chemical Co., Harcros Chemicals, Inc., and Uniroyal, Inc., C.D.U. Holding, Inc., Uniroyal Chemical Company will move this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an Order dismissing this action against the defendants with prejudice.

The basis for this motion is set forth in the accompanying Affidavit of Steven Brock, dated October 12, 1999 and exhibits attached thereto, and the accompanying Memorandum of Law. No prior request for the foregoing relief has been made. Accordingly, defendants' motion for dismissal with prejudice should be granted.

Dated: Uniondale, New York
October 12, 1999

Respectfully submitted,
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(516) 357-3000

By: /s/ Steven Brock
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DOW CHEMICAL COMPANY, et al.

Defendants. X

AFFIDAVIT OF STEVEN BROCK IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

STATE OF NEW YORK)
: SS.
COUNTY OF NASSAU)

1. Steven Brock, being duly sworn, deposes and says as follows:

I am a partner with Rivkin, Radler, and Kremer, attorneys for defendant The Dow Chemical Company, and am familiar with the proceedings in this action and the matters set forth in this affidavit. I am duly admitted to practice before the United States District Court for the Eastern District of New York. I make this affidavit in support of defendants' motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing with prejudice the claims alleged in *Isaacson v. Dow Chemical Co.* and *Stephenson v. Dow Chemical Co.* by the veteran plaintiffs and their family members. The affidavits and exhibits attached hereto demonstrate that plaintiffs are members of the Agent Orange class, which includes persons whose injuries were not manifest at the time of the settlement. Accordingly, the Court should dismiss their claims on the ground that they are barred by this Court's judgment of dismissal of the class action and order enforcing the Agent Orange Settlement Agreement. *In re Agent Orange Product Liab. Lit.*, 996 F.2d 1425, (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994).

2. Attached hereto as "Exhibit 1" is a true and correct copy of the Civil Action Complaint captioned *Joe Isaacson and Phyllis Lisa Isaacson, his wife v. Dow Chemical Company, et al, No.* OCN-L-2415-98 (N.J. Sup. Ct.), filed on July 17, 1998.

3. Attached hereto as "Exhibit 2" is a true and correct copy of Brief in Support of Plaintiffs' Motion to Remand, filed on September 28, 1998 in *Joe Isaacson and Phyllis Lisa Isaacson, his wife v. Dow Chemical Company, et al,* Civ. No. 3-98-03988 (D.N.J.).

4. Attached hereto as "Exhibit 3" are true and correct copies of an Opinion and Order of Judge Anne E. Thompson, entered on December 7, 1998 in *Joe Isaacson and Phyllis Lisa Isaacson, his wife v. Dow Chemical Company, et al,* Civ. No. 3-98-03988 (D.N.J.) (AET), denying plaintiff's motion to remand.

5. Attached hereto as "Exhibit 4" is a true and correct copy of the Transfer Order, dated February 3, 1999, which transferred *Joe Isaacson and Phyllis Lisa Isaacson, his wife v. Dow Chemical Company, et al,* to MDL-381.

6. Attached hereto as "Exhibit 5" is a true and correct copy of the Complaint For Damages in *Daniel Raymond Stephenson, et al. v. Dow Chemical Company, et al.,* No. CV99-0296 (W.D. La.), filed on February 17, 1999.

7. Attached hereto as "Exhibit 6" is a true and correct copy of the Transfer Order, dated April 12, 1999, which transferred *Daniel Raymond Stephenson, et al. v. Dow Chemical Company, et al.* to MDL-381.

8. Attached hereto as "Exhibit 7" is a true and correct copy of the Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund, dated September 1997.

9. Attached hereto as "Exhibit 8" is a true and correct copy of an Order in *Ryan v. Dow Chemical Co. et al.,* signed by Judge Jack B. Weinstein, dated April 11, 1994.

10. Attached hereto as "Exhibit 9" is a true and correct copy of *Addington v. Agent Orange Veterans Payment Program,* 1997 U.S. App. Lexis 39372 (2d Cir. November 24, 1997) (summary order).

11. Attached hereto as "Exhibit 10" is a true and correct copy of *Gough v. Agent Orange Settlement Fund,* 104 F.3d 353, 1996 U.S. App. Lexis 29000 (2d Cir. November 5, 1996) (Table).

/s/ Steven Brock
Steven Brock

Sworn to before me this
12th day of October, 1999

Notary Public

[Excerpts of attachments to Affidavit of Steven Brock in Support of Defendants' Motion to Dismiss]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

[Filed: Feb. 17, 1999]

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON AND EMILY ELIZABETH STEPHENSON Plaintiffs VERSUS DOW CHEMICAL COMPANY AND MONSANTO COMPANY Defendants	CIVIL ACTION NO.: CV99-0296 L-O SECTION: Judge Putnam MAGISTRATE: Judge Methvin

COMPLAINT FOR DAMAGES

NOW INTO COURT, come plaintiffs, Daniel Raymond Stephenson, Susan Stephenson, Daniel Anthony Stephenson, and Emily Elizabeth Stephenson, who aver the following:

NATURE OF CASE

I. Defendants have negligently produced and manufactured an unreasonably dangerous product and placed it into the stream of commerce. Through the joint and combined

negligence and/or gross negligence of Dow Chemical and Monsanto, through their acts and/or failures to act, plaintiffs were exposed to hazardous, toxic and carcinogenic substances which, upon information and belief, included but were not limited to, herbicides that contained 2,3,7,8 tetrachlorodibenzo-p-dioxin (e.g. TCDD or dioxin), thought to be one of the most toxic substances known to man.

JURISDICTION AND VENUE

II.

This Court has jurisdiction over this matter because this is a claim by residents of the State of Louisiana, against Defendants that are foreign corporations. Diversity exists between the Plaintiffs and the Defendants and the amount in controversy exceeds $75,000.00.

PARTIES

III.

Plaintiffs

A. Daniel Raymond Stephenson is a person of the full age of majority, domiciled in the State of Louisiana. Due to his exposure to the carcinogenic dioxin chemical commonly known as "Agent Orange," he has suffered injury including costs of medical treatment, loss of wages and income, mental and emotional suffering, humiliation and frustration, and many other economic, physical, and emotional losses, including loss of consortium, and other damages to be proven during the trial.

B. Susan Stephenson is a person of the full age of majority, domiciled in the State of Louisiana. Plaintiff has suffered a loss of society and comfort, mental and emotional suffering, and many other economic, physical, and emotional losses, including loss of consortium, and other damages to be proven at trial.

C. Daniel Anthony Stephenson is a person of the full age of majority, domiciled in the State of Texas.

Plaintiff has suffered a loss of society and comfort, mental and emotional suffering, and loss of consortium with his father.

D. Emily Elizabeth Stephenson is a person of the full age of majority, domiciled in the State of Louisiana Plaintiff has suffered a loss of society and comfort, mental and emotional suffering, and loss of consortium with her father.

IV.

Defendants:

The parties named and sued as the Defendants herein are as follows:

A. Dow Chemical Company is a Delaware corporation. Dow is headquartered in Midland, Michigan, with a principal place of business located at Baton Rouge, Louisiana, that manufactures, advertises and sell chemicals throughout the United States, including the Western District of Louisiana.

B. Monsanto Company is a Delaware corporation. The company manufactures chemical and agricultural products, pharmaceuticals, industrial process controls, and consumer products at sites located throughout the country, including the Western District of Louisiana. It does business worldwide and maintains its corporate headquarters in St. Louis, Missouri.

Hereinafter, Plaintiffs refer to Defendants as "Chemical Companies."

V.

Plaintiffs assert that during the Vietnam war, Mr. Stephenson was a helicopter pilot for the U.S. armed forces. From 1965 until 1966, Mr. Stephenson, served on the ground in the jungles of Vietnam and from 1969 to 1970, served as a Helicopter pilot, flying various missions into many different landing zones in Vietnam. Plaintiff was regularly in contact with the product commonly referred to as Agent Orange, a

form of phenoxy herbicide that contained 2,3,7,8 tetrachlorodibenzo-p-dioxin (e.g. TCDD or dioxin).

VI.

On February 19, 1998, Daniel Raymond Stephenson was diagnosed with multiple myeloma, a cancer of the bone marrow which is nearly always terminal. In August, 1998, Mr. Stephenson, on the advice of his physicians, underwent a bone marrow transplant. Because of the advanced nature of the disease and the injuries from dioxin exposure, Mr. Stephenson will be required to undergo another bone marrow transplant in April, 1999.

VII.

The Plaintiff realleges and incorporates herein, as if fully set forth, each and every allegation contained in paragraphs 1 through 6 hereof, and further alleges:

VIII.

The Defendants had a duty to the Plaintiff to produce and sell a reasonably safe product in design and manufacture, and to warn of the hazardous and unreasonably dangerous nature of Agent Orange and to warn of the dangerous and toxic nature of dioxin products.

IX.

The Defendants breached their duty of reasonable care to the Plaintiff by the following acts and omissions:

A. Failure to design, manufacture, and sell Agent Orange that was not carcinogenic and/or a product that did not contain unreasonably dangerous levels of dioxin;

B. Failure to warn the Plaintiff of the dangerous and toxic nature of Agent Orange, when they knew or reasonably should have known of dioxin's hazardous qualities, dangerous and toxic nature;

C. Otherwise failing to exercise proper care under the circumstances, due to knowledge of the health hazards

and health risks of handling the chemical and inhaling Agent Orange mist.

X.

As a direct and proximate result of the carelessness, negligence, fault, silence, omission, and inaction of the Defendants, the Plaintiff has suffered reasonable and foreseeable damages in an amount to be proven at trial including, without limitation, physical and economic injury, and severe emotional distress. Each of the Defendants, therefore, are liable to the Plaintiff jointly, severally, and *in solido* for all general, special, and equitable relief to which the Plaintiff is entitled by law.

XI.

The Plaintiff realleges and incorporates herein, as if fully set forth, each and every allegation contained in paragraphs 1 through 11, hereof, and further alleges:

XII.

The Defendants breached their warranties by offering for sale, and selling as not dangerous, the Chemicals Companies' dioxin products that were lethal and dangerous.

XIII.

The Defendants' breach of their express warranties of fitness for a particular use has caused the Plaintiff to become sick and ill. The Defendants, therefore, are liable to the Plaintiff jointly, severally, and *in solido* for all general, special, and equitable relief to which the Plaintiff is entitled by law.

XIV.

The Defendants impliedly warranted that their dioxin products, which they designed, manufactured, distributed, and sold to the U.S. government were merchantable for their ordinary use, that the Agent Orange in the defoliant was not unreasonably dangerous nor toxic.

XV.

The Defendants' defoliant purchased and consumed by agents of the United States was dangerous, toxic, unmerchantable, and therefore unfit for use when sold, and subjected the Plaintiff to danger. Therefore, the Defendants breached the implied warranty of merchantability at the time the Defendants' dioxin products were sold to United States military in that the Defendants' defoliant dioxin products were not fit for their ordinary purposes.

XVI.

As a direct and proximate result of the Defendants' breach of the implied warranty of merchantability, Plaintiff Stephenson is ill and disease stricken. The Defendants, therefore, are liable to the Plaintiff jointly, severally, and *in solido* for all general, special, and equitable relief to which the Plaintiff is entitled by law.

XVII.

The Plaintiffs realleges and incorporates herein, as if fully set forth, each and every allegation contained in paragraphs 1 through 16, above, and further allege against the Chemical Companies:

XVIII.

At all relevant times herein, the Chemical Companies were engaged in the business of manufacturing and selling their dioxin products for agricultural sale to consumers knowing the dangerous and toxic nature of dioxin. The Chemical Companies manufactured dioxin, failed to warn of its carcinogenic products, and then distributed and sold this product to United States residents, commercial farmers and the U.S. military despite the dangerous and toxic nature of Agent Orange.

XIX.

The Chemical Companies' dioxin was expected to and did reach the Plaintiff without substantial change in their

condition as manufactured, distributed and sold by the Chemical Companies.

XX.

The Plaintiff inhaled defoliating chemicals that were intended to be used in defoliating the jungles in Vietnam. The product harmed Plaintiff Daniel Raymond Stephenson by causing and/or subjecting the Plaintiff to become sick after contracting cancer. Owing to this sickness, plaintiff has required a bone marrow transplant and other surgeries to live.

XXI.

The Plaintiff was not aware of, and reasonably could not have discovered, the carcinogenic nature of dioxin and how dangerous it was, the Chemical Companies' manipulation of their knowledge of the dangers it posed, and the Chemical Companies' intent to enter this product into the stream of commerce, because Agent Orange was marketed and sold to the United States military without adequate warnings of dioxin's dangers to humankind or of its inherently dangerous nature.

XXII.

The Chemical Companies' dioxin defoliation products, containing levels of carcinogenic compounds, caused or subjected the Plaintiff Daniel Raymond Stephenson to become sick and contract disease upon exposure, and therefore constitutes a product unreasonably dangerous for normal use due to its defective design, defective manufacture, and the Chemical Companies' inadequate warnings to the Plaintiff.

XXIII.

The Chemical Companies, therefore, are strictly liable to the Plaintiffs jointly, severally, and *in solido* for all general, special, and equitable relief to which the Plaintiffs are entitled by law.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for judgment against the Defendants, and each of them, jointly, severally, and in solido as follows:

1. For compensatory damages as alleged herein;

2. For medical monitoring, whether denominated as damages or in the form of equitable relief;

3. For reasonable attorneys' fees;

4. For pre-judgment interest from the date of filing of this suit;

5. For all costs of this proceeding; and,

6. For all general, special, and equitable relief to which the Plaintiffs are entitled by law.

Respectfully submitted this 15th day of February, 1998.

/s/ Daniel Raymond Stephenson
Daniel Raymond Stephenson
IN PROPER PERSON

/s/ Susan Stephenson
Susan Stephenson
IN PROPER PERSON

/s/ Daniel Anthony Stephenson
Daniel Anthony Stephenson
IN PROPER PERSON

/s/ Emily Elizabeth Stephenson
Emily Elizabeth Stephenson
IN PROPER PERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[FILED Sept. 29, 1997]

In re	:	
	:	
"AGENT ORANGE"	:	MDL No. 381
	:	
PRODUCT LIABILITY	:	
LITIGATION	:	

FINAL REPORT OF THE SPECIAL MASTER ON THE DISTRIBUTION OF THE AGENT ORANGE SETTLEMENT FUND

September 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re	:	
	:	
"AGENT ORANGE"	:	MDL No. 381
	:	
PRODUCT LIABILITY LITIGATION	:	

ORDERED REGARDING SUBMISSION AND ACCEPTANCE OF THE FINAL REPORT OF THE SPECIAL MASTER ON THE DISTRIBUTION OF THE AGENT ORANGE SETTLEMENT FUND

The Special Master has submitted to this Court the Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund, dated September 24, 1997. In the

Report, the Special Master advises that the distribution activities of the Agent Orange Settlement Fund have concluded and that all Settlement Fund assets have been expended and committed through the programs established by this Court for distribution of the Fund. The Report notes that certain minor administrative activities necessary to conclude finally the activities of the Fund are ongoing but that such activities will not affect in any way the prior disposition of Settlement Fund assets in accordance with the plan for distribution of the Fund. The Report documents the manner in which the Settlement Fund assets were distributed and expended throughout the duration of the Settlement Fund from May 1954 (the date of the settlement) through the present and includes an accounting of the revenues and expenses of the Fund. Thus, the Report constitutes the final report on the disposition of the fund assets subject to the minor activities and functions remaining to be completed as described in the Report.

The Report of the Special Master is accepted and approved for filing and docketing and is confirmed as the Final Report on the Distribution of the Agent Orange Settlement Fund.

The Clerk of the Court is directed to file and docket this Report and to forward a copy of the Report to the Clerk of the Court for the United States Court of Appeals for the Second Circuit for transmission to the Chief Judge of that Court.

SO ORDERED.

Date: September 26, 1997

/s/ Jack B. Weinstein
Jack B. Weinstein
United States District Judge

PART I : OVERVIEW: SETTLEMENT, DISTRIBUTION PLAN AND IMPLEMENTATION STRUCTURE

The Agent Orange Settlement Fund was created by the resolution of a class action litigation commenced in 1979 by and on behalf of Vietnam veterans and their family members. The class complaint alleged that the veterans had been injured by exposure to herbicides used by United States Armed Forces as defoliants during the Vietnam War. (For purposes of simplicity, the various herbicides used are referred to collectively by the term "Agent Orange" — the name by which one of those herbicides was identified during the war.) The defendants in the action consisted of various chemical companies that had manufactured the herbicides for use by the Armed Forces of the United States government. At the time of its commencement, the Agent Orange litigation was reported to be the largest mass tort litigation ever filed.

The District Court initially certified the action as a class proceeding in 1980. *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980), *modified*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.). *cert. denied*, 465 U.S. 1067 (1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). The class as certified was defined as "those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984 directly or derivatively injured as a result of the exposure." 100 F.R.D. at 729. The Court estimated that the class included

between 2 and 3 million veterans and 8 to 10 million family members.

Notice of the class was distributed during March 1984 (after the Second Circuit vacated the stay it had entered in conjunction with a petition for mandamus that had been filed challenging the class). The class members were given the opportunity to withdraw from the class, and by the end of the opt-out period, 2,440 class members had in fact elected to withdraw from the class. (A separate class was certified as a mandatory non-opt-out class on the issue of punitive damages, and class members were prohibited from withdrawing from that class.)

The Court scheduled trial to commence in May of 1984 using initially ten plaintiffs asserting claims characteristic of the allegations of the class. On May 7, 1984 — the day jury selection was to commence — the parties agreed to settle the class litigation for the aggregate sum of $180 million. The defendants paid the aggregate settlement amount including accrued interest into the Court-established account between May 1984 and January 1985.

The settlement agreement did not provide any specific guidelines as to the distribution of the Settlement Fund to the plaintiff class. Rather, the agreement set forth only general requirements and specified that the Settlement Fund was to be maintained and administered by the Court and remain under the Court's continuous jurisdiction, control and supervision. The Court was granted the authority to retain auditors, special masters, disbursing agents, consultants and counsel and to enter into contracts.

The Court held extensive hearings at different locations around the country in order to solicit the views of the class members as to the fairness of the settlement and the appropriate mechanism for distributing the Settlement Fund assets. The Court heard the public statements of hundreds of witnesses and class members, and it reviewed hundreds of letters and written submissions from class members detailing

their views regarding how the Settlement Fund should be used to benefit the class. At the conclusion of the hearings and after the review of the comments of the class, the Court issued an extensive opinion and order analyzing the comments of the class members, evaluating the legal positions of the parties and assessing the terms of the settlement. Based on that analysis, the Court preliminarily approved the settlement as fair, reasonable and adequate in accordance with applicable federal rules but reserved a final decision on approval of the settlement pending the development of a plan for distributing the assets of the settlement.[2]

The Court then requested the submission of plans for the distribution of the Settlement Fund assets and requested that the Special Masters previously appointed — Kenneth R. Feinberg and Richard J. Davis — assist in coordinating the consideration of distribution options and managing the investment of Settlement Fund assets.[3] In responding to the

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[2] The Court, in fact, approved the settlement on January 7, 1985 and reaffirmed that decision on June 18, 1985 based on information submitted regarding possible mechanisms for distribution. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp.1296, 1346 (E.D.N.Y. 1985), *modified*, 818 F.2d 226 (2d Cir. 1987). The Court issued a Final Order and Judgment of Dismissal on July 9, 1985. *Ryan v. Dow Chem. Co.*, 618 F. Supp. 623 (E.D.N.Y. 1985).

[3] The Court initially appointed three Special Masters — Leonard Garment, Kenneth R. Feinberg and David I. Shapiro — to assist the parties in exploring options for settlement of the litigation. The Court subsequently appointed Richard J. Davis to assist the Court with management of the Settlement Fund assets and overall investment strategy regarding the Settlement Fund. Kenneth R. Feinberg continued to serve as Special Master with responsibility for oversight of the administration of the distribution plan until June 1993. At that point, the Court appointed the current Special Master, Deborah Greenspan, to supervise the distribution of the Settlement Fund; to manage appeals and to oversee the closure of Settlement Fund activities.

Court's request, the Special Masters obtained the advice and assistance of a 29-member group of Vietnam-era veterans.

The development of a fair mechanism for distributing the Settlement Fund assets to the class was a significant challenge: first, as discussed in the Court's Opinion reviewing the settlement terms, the plaintiffs lacked adequate proof to establish a causal link between the exposure to herbicides and the multitude of illness and injuries claimed. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 782 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). As the various injuries alleged (with perhaps one exception) appeared in the general population and were attributable to various causes or were of unknown etiology, it was impossible to determine which class members among those who might suffer from one or more of a large group of claimed diseases, including peripheral and central neuropathy, liver disorders, gastrointestinal conditions and all tumors and metabolic problems, ought to receive a payment from the Settlement Fund based on the presence of a particular disease. Second, given the vast size of the class, it seemed unreasonable to simply distribute the money on some sort of pro-rata basis, such as by providing an equal distribution to each class member. Indeed, depending on the rate of claims filings, class members might obtain payments of as little as $5 or $10 using such a distribution system. Third, use of the Settlement Fund assets to provide some general benefit to the class — for example, medical research — seemed duplicative of the undertakings of governmental entities and also seemed to ignore the real need of some class members for a concrete response to their claims. The task, therefore, was to develop a plan for distributing the Settlement Fund assets that would target the funds in a meaningful way and, to the extent possible, augment the benefit to the class by leveraging the funds.

Ultimately, after additional formal hearings, the Court adopted (with slight revision) a plan of distribution prepared

by the Court-appointed Special Master taking into account the input received from the various veteran advisors. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985), *modified*, 818 F.2d 179 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234, *and modified*, 689 F. Supp. 1250 (1988). The plan presented by the Special Master specified two mechanisms for the distribution of Settlement Fund assets to the class members residing in the United States. First, the plan recommended the distribution of cash payments to individual class members, including both veterans and families of veterans, based generally on the severity of the veteran's medical condition or death (along with other factors). The objective of this cash payment program was to provide prompt financial benefits to those class members most in need. Second, the plan recommended the leveraging of Settlement Fund assets for the benefit of the class through the establishment of a grant-making "foundation." The purpose of the grant-making foundation was to provide initial funding for organizations to provide services and benefits specifically targeted to the needs of the class, including, particularly, the children of the veterans. The intent of the grant-making program was twofold: first, to provide immediate funding to address the un-met needs of the class members, and, second, to educate — through example — existing social service organizations and other grant-making entities and foundations as to the particular needs of the Vietnam veteran community and the class members in particular. The hope was that through education and provision of directed funding the "foundation" established to distribute Settlement Fund assets would become and would create a lasting legacy for the Vietnam veteran community by institutionalizing a services support network directed at the needs of the population of Vietnam veterans and their families.

Upon approval of the plan of distribution, the Court commenced the procedures for establishing the administrative systems necessary to implement that plan.

The Court established a request-for-proposal process for the selection of a claims administration facility and for the selection of investment managers to advise and assist in the proper investment of Settlement Fund assets. The request-for-proposal process yielded 16 applications from groups and entities interested in providing claims services and 39 applications from financial institutions and other entities interested in providing investment and depository services. The request-for-proposal process incorporated detailed review by the Court, the Special Masters and the Advisory Board of Vietnam veterans. The procedures employed for the selection of contractors to provide the requisite management services for the Court are described below in the sections outlining the operation of the distribution programs.

Prior to the completion of implementation procedures, appeals as to certain aspects of the Court's decisions regarding the settlement were lodged. As a result, the United States Court of Appeals for the Second Circuit stayed implementation of the distribution plan pending the resolution of appeals. Finally, on April 21, 1987, the Court's decisions certifying the class, finding the settlement to be fair, reasonable and adequate, and adopting the distribution plan (with some modification) were affirmed by the United States Court of Appeals for the Second Circuit.[4] *In re*

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[4] The modification to the distribution plan mandated by the Court of Appeals concerned only that portion of the distribution plan providing for a "foundation" to establish grant programs for the benefit of the class. The distribution plan as originally approved by the District Court contemplated an independent foundation that would operate with Court guidelines but that ultimately could become a wholly-independent entity with fund-raising capability that could exist in perpetuity. The Court of Appeals rejected the concept of an independent entity, and while endorsing the concept of a grant-making program, it required that any distribution of assets be directly controlled by the Court. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) ("We are unwilling for several reasons to

"Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

Subsequently, on July 5, 1988, after the Supreme Court declined to review any aspect of the case, the Court issued an Opinion and Order specifying the final terms for distribution of the Settlement Fund assets. *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250 (E.D.N.Y. 1988) ("Final Distribution Opinion").

The Final Distribution Opinion adopted by the Court established the two mechanisms outlined above for the distribution of Settlement Fund assets to and for the benefit of the class members in the United States. First, the Court established the Agent Orange Veteran Payment Program. The function of this program was to distribute cash payments to certain individual class members. The concept defining the Payment Program was that a distribution plan for the settlement of a tort action should reflect traditional tort concepts in the sense that individuals should receive compensatory payments for their claimed injuries. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1410 (E.D.N.Y. 1985); *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250 (E.D.N.Y. 1988). The Program's guidelines, which are described more fully in Part II below, mandated the distribution of such payment to totally disabled Vietnam veterans and to the survivors of deceased Vietnam veterans. Because this program was to be the mechanism by which veteran class members would receive traditional compensatory-type payments, the bulk of the Settlement Fund assets were allocated to this program. Second, the court established the Agent Orange Class Assistance Program. This program replaced the original concept of a foundation

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permit the distribution of any settlement proceeds to a largely independent foundation.").

for the benefit of Vietnam veterans and their families with a grant-making program operating for a finite period under Court supervision. The mandate of the Class Assistance Program was to leverage remaining Settlement Fund assets most effectively by providing grants to institutions and entities for the purpose of providing services (including assistance in accessing other benefits and information) to Vietnam veterans and their families. The Class Assistance Program is described in detail in Part III below. In addition, the Court allocated Settlement Fund assets to class members in New Zealand and Australia based on the percentage of Armed Forces in Vietnam from those two countries and allocated a portion of the Settlement Fund for attorneys' fees based on an extensive review of attorneys' fees petitions. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985) (Memorandum and Order on Attorneys' Fees As Modified and Final Judgment), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987); *and*, 611 F. Supp. 1452 (E.D.N.Y. 1985), *rev'd*, 818 F.2d, *cert. denied*, 484 U.S. 926 (1987).

In the Final Distribution Opinion the Settlement Fund assets (including earnings) were allocated to the above-described programs and purposes. In accordance with that allocation, funds aggregating $243,575,9[illegible]6[5] were transferred to specific programs during the period July 14, 1988 to November 22, 1988 approximately as follows:

$ 172,775,853 to the Agent Orange Veteran Payment Program

$ 42,000,000 to the Agent Orange Class Assistance Program

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[5] The aggregate amount and allocation are recorded in the Agent Orange Settlement Fund Report and Financial Statements of Price Waterhouse LLP, Attachment H.

$ 10,000,000 retained for the Indemnity Fund[6]

$ 13,825,000 for fees of plaintiffs' attorneys

$ 4,500,000 for class members in Australia

$ 500,000 for class members in New Zealand.

Upon conclusion of the appellate process, the Court provided for the immediate implementation of the distribution plan in order to provide funds to class members as promptly as possible. The Payment Program commenced operations in July of 1988 (immediately after the issuance of the Court's Final Distribution Opinion regarding the distribution of the Settlement Fund) and began mailing of application forms to class members in November of 1988. The Class Assistance Program commenced operations in January of 1989 and began issuance of initial grants on March 30, 1989. A detailed chronology of the implementation of the distribution plan with respect to each "program" is contained in Parts II and III below.

The programs established by the Court to distribute Settlement Fund assets were supervised directly by the Court and remained under the Court's control and jurisdiction at all times. The Court appointed various contractors and individuals to provide necessary processing, management and investment services to accomplish the distribution of the Settlement Fund's assets as described more fully below. The Court was assisted throughout the implementation of the distribution plan by two Advisory Boards of Vietnam veterans. The Advisory Board assisting specifically with the implementation of the Payment Program consisted of five members: Charles T. Hagel, Vincent J. Martin, Jr., John L. McElrath, Donna-Marie Boulay, and Albert A. Dandridge,

[6] The Indemnity Fund (of $10 million) was mandated by the settlement agreement and was to be paid to or for the benefit of the settling defendants in the event that any class members obtained verdicts against the defendants in any subsequent state court litigation.

III. The Advisory Board assisting with the Class Assistance Program consisted initially of ten Members and at the conclusion of the Program had nine Members. The Class Assistance Program Board Members and their dates of service follow: Rev. Robert Certain (1989-1991), Steve Champlin (1989-1990), Mary Lou Keener (1989-1993), Professor Gary E. May (1989-1996), Frank McCarthy (1989-1996), The Honorable Matt Railey (1989-1996), Dr. Oscar Salvatierra (1989-1996), Solomon B. Watson, IV (1989-1996), Helen R. Phillips (1994-1996), Diane Carlson Evans (1994-1996), Ron Gardner (1989-1996), and Charles T. Hagel (1989-1996). The Board members provided invaluable insights and assistance, and all served and expended countless hours without any compensation.

PART II: THE AGENT ORANGE VETERAN PAYMENT PROGRAM

A. Mandate/Outline of Eligibility Guidelines: Distribution Guidelines Established by the Court.

The basic outline and guidelines for the distribution of Settlement Fund assets through the Payment Program are contained in the Distribution Opinion issued by the Court on May 28, 1985 and the Final Distribution Opinion issued by the Court on July 5, 1988. Detailed administration guidelines and specific claims-processing protocols were developed under the Court's supervision during the implementation of the claims-processing facility. The more detailed administrative guidelines are described in this Report or are set forth in various attachments to the Report.

The Payment Program was established to provide the mechanism for distributing cash payments to a portion of the class members. The Court-adopted distribution plan was premised on the theory that a substantial portion of the Settlement Fund assets should be focused on the veterans within the class and, more specifically, on those veterans who were most injured or in need of assistance. Concluding

that there was no realistic basis upon which to distribute the Settlement Fund based on the type of disease alleged or the nature of the alleged herbicide exposure, the Court approved the distribution of Settlement Fund assets based on a finding of total disability or death. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1400 (E.D.N.Y. 1985) ("Because no substantial scientific evidence supports a finding of causal connection between Agent Orange exposure and any specific disease except chloracne, and because of the near impossibility of proving that any particular plaintiff's condition was caused by Agent Orange, dividing the fund among those with particular diseases is unjustified."). By using the death and disability criteria for the focused distribution of a significant portion of the Settlement Fund assets, the distribution plan channeled assets in a meaningful way to those class members with the most severe conditions. (In contrast, any program under which assets of the Settlement Fund would be distributed on a pro-rata basis to class members would have resulted in de minimis payments to individuals, and any plan that would have distributed assets based on some assumed (but unproven) causal connection between exposure and certain diseases would have distributed potentially significant amounts of money to relatively fewer claimants on a purely speculative basis, in the Court's view.) The use of disability and death as the key factors for distinguishing among class member claimants allowed for ease of administration, an equitable allocation of assets to the class as a whole and objective eligibility criteria that are both understandable and relatively simple to apply fairly among various claimants.

Under the guidelines established by the Court, to be eligible for compensation from the Payment Program the class members were required to establish the following: first, that the veteran served in or near Vietnam between 1961 and 1972 as a member of the United States Armed Forces (as mandated by the class definition); second, that the class member applicant was either a totally-disabled Vietnam

veteran or the survivor of a deceased Vietnam veteran who served in the United States Armed Forces in Vietnam during the requisite period; third, that based on the circumstances of the veteran's service (including location of service and particular experiences during service) the veteran met a test of probable exposure to herbicides; fourth, that the death or disability was not caused by a traumatic or accidental occurrence; and, fifth, that the death or disability occurred before December 31, 1994 (which was the Court-established closure date for the Payment Program).

The Court-adopted distribution plan provided for an eligibility and payout period equivalent to ten years from the date of settlement (i.e., from May 1984 when the action was settled until December 31, 1994). Under the distribution plan any class member who manifested an eligible condition during that period and filed an application was permitted to obtain a distribution from the Settlement Fund. The ten-year period selected reflected a balancing of the interest in prompt distribution of Settlement Fund assets to the class and the desire to provide benefits for a reasonable length of time after the last possible exposure to herbicides. The Program closure date in effect was 22 years after the last exposure date based on the class definition.

In order to assure appropriate and equivalent treatment of claims, the distribution plan defined the requirements of death and disability with reference to standard criteria. Veteran class members were eligible for a disability payment if they could demonstrate a total, permanent disability as defined by the Social Security Act. The veteran need not be eligible for or receiving Social Security disability benefits, but the claims administration facility was required to review the medical documentation to determine the presence of a disability consistent with that definition. Any disability was eligible except those caused by an accidental, traumatic or self-inflicted injury. In other words, disabilities caused by various physical and mental ailments except those attributed to a specific accidental or traumatic cause (such as, for

example, a work-related injury) were considered eligible for payment. Similarly, survivors of veterans were eligible for payment provided the death was not caused by accident, trauma or self-infliction. By excluding accidental and traumatic deaths and injuries the eligibility criteria eliminated deaths and disabilities that could clearly be attributed to a source other than herbicide exposure and thereby preserved funds for other members of the class.

Recognizing that requiring class members to demonstrate that they had been exposed to herbicides might prove quite burdensome, the Court adopted a mechanism to determine a probability of exposure to herbicides in order to assure compliance with the class definition in distributing cash payments to class members. Under the Court's exposure test, claims were reviewed using a computerized exposure evaluation system, under which the veteran's location of service in Vietnam was compared to the documented locations of herbicide spraying. This objective system was implemented through the development of a computer database that incorporated extensive information about the location of military units and the locations of herbicide spray missions and applied certain Court-approved parameters for determining a probability of exposure. More specifically, the computerized evaluation system matched service locations (obtained from the claimant's exposure form and from the documented locations of military units) to herbicide spray locations.[7] To be considered a match, the veteran's service did not have to occur at the exact time and place of spraying. Rather, the system took into account *past* herbicide spraying in an area up to fifteen kilometers from

[7] Detailed information about troop locations and movements was obtained from a variety of sources, including military records and data correlated from claimants. Troop locations were considered to cover a large area in applying the exposure review to account for the fact that various members of a unit might be widely dispersed.

the veteran's general unit location and assigned exposure "scores" when the locations matched. The exposure evaluation system added up monthly exposure "scores." The "scores" were calculated taking into account both time and distance from herbicide spraying so that a veteran who moved into an area in which spraying had previously occurred would receive a "score" for that location. Thus, as the time between spraying and the veteran's location in an area increased, or as distance increased, the exposure "score" decreased. Generally, with the exception of veterans who served very late or very early in the war, those who served in Marine and Army combat units satisfied the exposure eligibility criterion. Those who served in the off-shore Navy or at air bases outside the area of herbicide use were most commonly found not to be exposed under this system. The exposure evaluation system is described in detail in the Final Report of the Exposure Evaluation Unit at Attachment B.

Payment amounts were varied under the guidelines based on the date of onset of the veteran's total disability or the date of the veteran's death. Thus, under the payment guidelines, those class member veterans with disabilities that commenced earlier received greater compensation than those with disabilities that commenced later. As the disability is by definition a permanent condition, the effect of that payment variation is to provide greater compensation to those whose disability would likely last longer and whose disability likely commenced at an earlier age. The payment formula adopted by the Court assigned compensatory amounts for each month of disability commencing with January 1, 1970 and ending on December 31, 1994.

The Payment Program eligibility criteria also specified certain guidelines based on the age of the veteran at the time of disability or death and further contained certain filing deadlines by which class members were required to submit their claim materials. The Program did not authorize payment for deaths or disabilities occurring after the veteran reached age 60.

Payment levels were established initially based on projections regarding the likely volume and characteristics of claims. Based upon a review of preliminary claim forms and Social Security disability data, the Special Master developed initial anticipated claim payment levels. Final payment levels were determined after a review of the initial group of claims filed. Originally, in the Final Distribution Opinion the Court had anticipated that payments to eligible disabled veterans might be based on an assigned amount per year of disability. The Court noted in that Opinion, however, that claims payment formulas might need to be adjusted to account for claims experience. Once the initial batch of claims was analyzed, the Court was able to finalize a payment formula based on actuarial projections regarding the anticipated number and nature of unreviewed and future claims. Based on the analysis conducted, the Court was able to establish a payment amount based on each month of disability, which permitted more particularized calculation of benefits and a simpler administrative process. The calculation formula finally adopted by the Court applied a monthly disability payment of $42.67 for each month of disability during the Program term.[8] This payment formula was maintained throughout the entire period of distribution of the Settlement Fund.

Payments to disabled veterans eligible to receive a disability award under the Payment Program guidelines were originally issued in annual installments. Each year the claimant was required to re-certify the disability, i.e., confirm its continued existence, in order to receive the next installment payment. As described below, this installment payment system was modified at a later stage in the Program.

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[8] The final payment formula approved by the Court resulted in a maximum aggregate inability award of $12,800 and a maximum survivor payment of $3,400.

The Payment Program guidelines further defined the eligible survivors to consist of spouses and minor children of veterans. As described below, the definition of eligible survivor was modified to incorporate other family members.

B. Modifications to the Plan of Distribution.

During the course of implementation of the Payment Program, the Court issued periodic orders modifying eligibility and claim-filing guidelines. These modifications were based on an evaluation of claims experience and were adopted in order to respond to claimants' needs and to distribute more efficiently the assets of the Settlement Fund. Following is a summary of the modifications made to specific distribution guidelines:

1. Modification of Deadline for Submission of Applications. Initially, the Distribution Opinion required that all applications must have been filed by a specific deadline (either March 1, 1989 or 120 days after occurrence of the eligible disability or death). The modification eliminated the filing deadline and permitted the filing of applications at any time during the duration of the Payment Program. *Order Regarding Modifications to the Agent Orange Veteran Payment Program*, November 15, 1989.

2. Modification of Definition of Eligible Survivors. Initially, the Distribution Opinion provided that compensation for deceased veterans be provided only to surviving spouses and dependent children. The Court modified that guideline to permit the distribution of survivor payments to parents, adult children and siblings in addition to spouses and dependent children. *Order Regarding Modifications to the Agent Orange Veteran Payment Program*, November 15, 1989.

3. Modification of Installment Payments. The Distribution Opinion required that payments to eligible disabled veterans would be made in annual installments. The Court directed the provision of a partial lump-sum

payment to enable eligible veterans to receive a greater portion of their total award earlier. This modification was deemed possible based on an actuarial analysis of claims filings. *Order Regarding Modifications to the Agent Orange Veteran Payment Program*, November 15, 1989.

4. Provision of Lump-Sum Payments. The distribution plan, as noted, originally called for the payment of disability awards in installments and further permitted for the adjustment of awards in the event that claims experience demonstrated that payment levels should either be increased or decreased. During the course of the Program implementation, the Special Master continued to monitor the payment and claims experience to determine whether any adjustment was required. During the initial years of the implementation of the Payment Program, actuarial analyses were conducted every quarter. These analyses reviewed projected claims volume and character as compared to claims filings and actual claim statistics, and they determined whether, based on that information, the Settlement Fund's assets would be sufficient to pay all anticipated claims at the payment levels established initially by the Court. In later years of the Payment Program, these actuarial analyses were supplemented by further estimates conducted by Price Waterhouse. In 1993 the Special Master reported to the Court that actuarial projections indicated that the Payment Program account would have sufficient assets to pay all claims filed by the publicized closure date at the payment levels initially established by the Court. In light of that report, the Court directed that all claims should thereafter be paid on a lump-sum basis. Commencing in September 1993 all Payment Program participants who had previously received an installment payment were sent a lump-sum payment constituting the unpaid remainder of their total award. Any applicant

approved for payment after that date received the entire award in a lump-sum payment. *Order*, June 10, 1993.

5. Extension of Program. Subsequent to the elimination of the filing deadline explained above, the Court granted one additional extension permitting the filing of applications beyond the deadline established in the November 15, 1989 Order. On December 29, 1994 the Court authorized a brief extension of the deadline for filing applications for those class members who had not previously filed application kits. As the Program deadline of December 31, 1994 approached, the Claims Administrator was inundated with a significant volume of requests for application kits from class members. The Claims Administrator reported that it was unable to respond to all the requests in time to permit the actual filing of application kits by the December 31, 1994 deadline. Based on that report, the Court authorized a brief extension — until January 17, 1995 — for class members to obtain and file application kits. The Payment Program extension and the procedures developed to address the volume of claims filings in response to the extension are addressed below. *Order*, December 29, 1994.

The Orders specifying modifications to the eligibility criteria are contained at Attachment A.

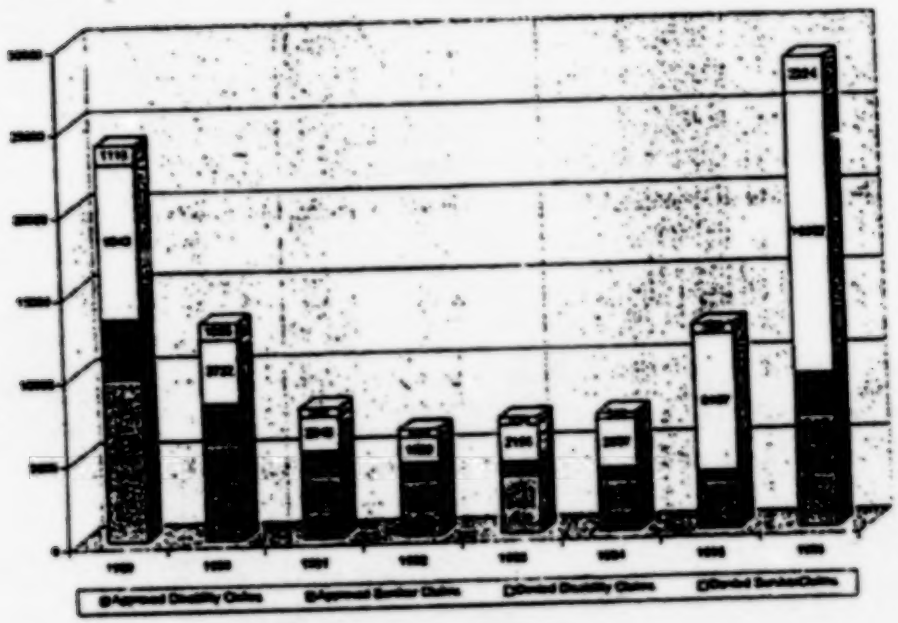
C. Implementation of Payment Program and Distribution Plan: Selection of Contractors/Oversight.

In order to implement the distribution plan, it was necessary for the Court to appoint various contractors to provide the actual claims-processing, audit and review services required to effect distribution of the Settlement Fund assets to the class members. The Court-appointed Special Masters conducted public bid processes in order to obtain a pool of appropriate candidates capable of providing the necessary services in the most cost efficient manner.

To select a claims administrator and investment managers to implement the distribution plan, the Special Masters developed a formal Request for Proposal ("RFP") with the advice and assistance of the Advisory Board of veterans and various consultants experienced in securing and providing claims-processing services. The Special Masters advertised the availability of the Request for Proposal and provided the RFP to the 232 entities and individuals who requested the document. By the end of the RFP process, the Special Masters had received ten proposals to

* * * *

[31]



3. Geographic Distribution of Applicants.

Claims were submitted from each state in the United States plus the District of Columbia and Puerto Rico. A small portion of claims were submitted by individuals residing outside the United States (including Guam and the

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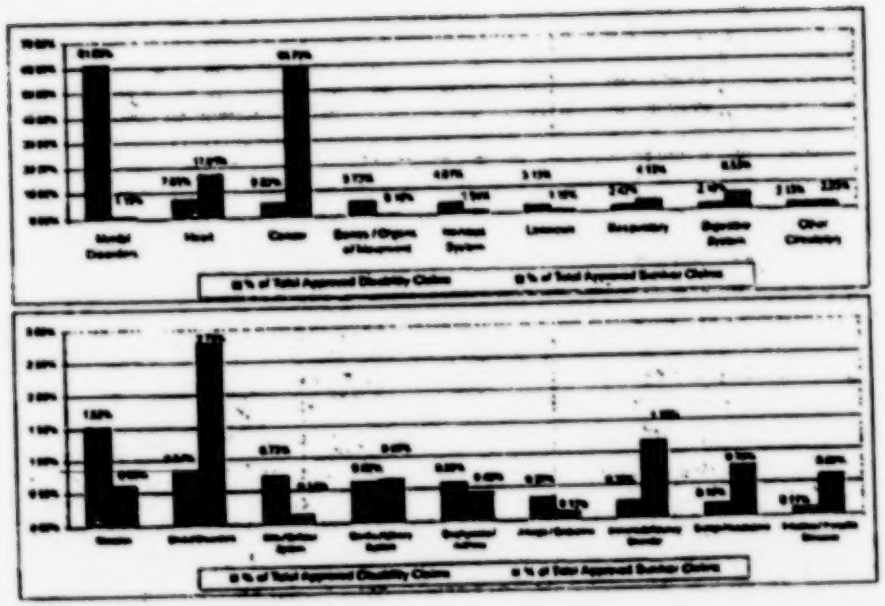
U.S. Virgin Islands). The states with the highest number of claimants were Texas (7,162 claims), California (7,106 claims), and Florida (5,924 claims). In addition to those three states, five other states accounted for over 4,000 claims each: Georgia, North Carolina, New York, Ohio and Pennsylvania. The states with the smallest number of claimants were North Dakota (169 claims), Vermont (169 claims) and Wyoming (177 claims), and the District of Columbia was included in this category as well (161 claims). The approval and denial rates vary in each state, and there does not appear to be any discernable pattern. A breakdown of all claims by state of the claimants' residences is contained in the Final Report of the Claims Administrator.

4. Causes of Disability and Death Among Veteran Applicants.

The Claims Administrator tracked the general cause of the disability or death among the approved claims and, where discernable, among the denied claims. The Claims Administrator's statistics indicate 19 different causes of death or disability among claimants. The most common cause of disability among approved disability claimants was mental disorder (including post traumatic stress disorder). Heart disease, cancer and diseases of the bones and organs of movement were the next most common causes of disability among approved disability claims. The most common causes of death resulting in approved survivor claims were cancer, heart disease and diseases of the digestive system — with cancer accounting for 59 percent of the approved survivor claims.

Following is a graph showing the breakdown of approved claims (on a percentage basis) by the cause of disability or death.



(Percentage = number of claims approved for particular cause in each category (disability/survivor) divided by the number of approved claims in each category (disability/survivor).)

5. **Demographic Information.**

The applicant population was predominately male, but, according to the Claims Administrator's records, 150 female veterans applied for benefits from the Program.

The Payment Program and Claims Administrator made efforts to publicize the Program among incarcerated veterans through veterans organizations and publications that could reach the prison population. Ultimately, 177 incarcerated veterans did apply for benefits.

The average age at onset of the condition qualifying for payment varied only slightly: for the five most common conditions resulting in a disability payment, the average age of onset was between 41 and 46. For the five most common conditions resulting in death, the average age of death again ranged between 41 and 46.

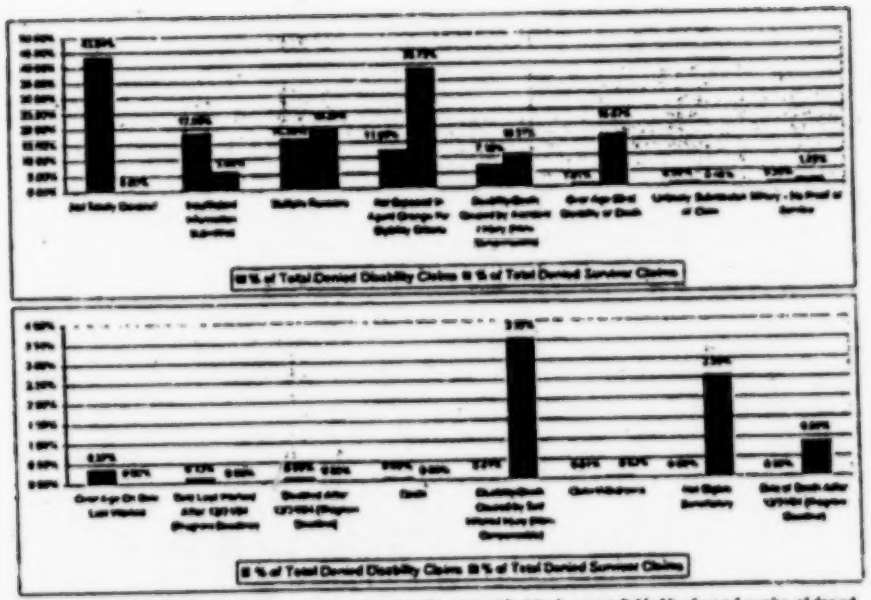
6. **Basis for Ineligibility.**

Claims could be denied for a variety of reasons including failure to meet any of the required eligibility criteria, failure to submit information sufficient to evaluate the claim, and

failure to file the claim by the Court-mandated deadline. For disability claims, by far the most common reason for denial of a claim was a finding by the Claims Administrator that the applicant had not demonstrated a total disability. A total of 44 percent of the disability claims denied were denied based on the applicants' failure to meet the disability requirement. A determination that the applicant failed to meet the disability requirement could be based on evidence that the applicant continued substantial employment, or presentation of medical evidence showing an illness that was not totally disabling. A total of 7 percent of the disability claims denied were denied based on a finding that the disability was in fact caused by an accident or traumatic injury. Thirteen percent of the disability denials resulted from a finding that the veteran did not satisfy the Court-approved standard for demonstrating a probability of exposure to herbicides based on the circumstances and location of service. Most commonly, a denial based on exposure would occur where the veteran served outside the country (such as on an off-shore Naval vessel) or served very late or very early in the war when herbicide spraying was either confined to a limited area or had been discontinued. Very few claims were denied as untimely: a total of 275 disability claims (less than 1 percent of all disability claim denials) were disallowed based on failure to file by the required deadline.

The most common basis for denial of a survivor claim was the failure to satisfy the Court-approved standard for exposure. A total of 39 percent of the survivor claims denied (13 percent of all survivor claims) were denied based on the exposure criterion. A relatively substantial number of claims (1,109 or 16 percent of all survivor claim denials) were denied on the ground that the veteran was over age 60 at the time of death. A large portion of claims (1,303 or 19 percent of survivor denials) were denied for multiple reasons.

Following is a graph showing the basis for denial of claims for the two categories of claims (disability and survivor).



(Percentage – number of claims denied for particular cause in each category (disability/survivor) divided by the total number of denied claims in each category (disability/survivor))

7. **Disbursements.**

The Payment Program has issued payments totaling $196,580,450[13] to class members. Of this amount approximately 85 percent was distributed to disabled veterans and the remaining 15 percent was distributed to survivors of deceased veterans. Sixty-five percent of the total amount paid to disability claimants was paid to class members whose disability was based on a mental disorder. Seven percent of the total paid to disability claimants was paid to class members whose disability was based on cancer. By contrast 59 percent of the amount paid to survivor claimants in the aggregate was paid to survivors of veterans who died from cancer. The states/areas

* * * *

[13] An additional $14,634.66 was distributed in response to appeals after the preparation of financial statements and therefore is not included in the aggregate breakdown.

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CHRONOLOGY OF EVENTS REGARDING DISTRIBUTION OF THE SETTLEMENT FUND

May 7, 1984	Settlement Reached
September 25, 1984	Court Issues Preliminary Approval of Settlement
May 28, 1985	Court Adopts Distribution Plan
August 27, 1986	Implementation of Distribution Stayed by Appeals
April 21, 1987	Settlement and Distribution Plan Approved on Appeal
June 30, 1988	Supreme Court Denies Certiorari on Last Petition
July 5, 1988	Court Issues Final Distribution Opinion Authorizing Implementation of Distribution Plan
July 8, 1988	Claims Administration Facility Begins Implementation
September 1988	Claims Administrator Distributes Initial Letter to Class
November 1988	Claims Administrator Distributes Application Kits for Payment Program
January 1989	Court Appoints Executive Director for Class Assistance Program
February 1989	Claims Administrator Begins Distribution of Payments Under Payment Program
March 1989	Class Assistance Program issues Initial Grants
November 1989	Court Modifies Certain Aspects of Payment Program
September 1993	Payment Program Issues Lump-Sum Payments

May 1994	Class Assistance Program Holds Symposium on Veterans Issues
December 1994	Payment Program Extends Deadline for Claim Submission
September 1996	Claims Administrator Completes Processing of Payment Program Claims

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MICHAEL F. RYAN, et al.,

Plaintiffs,

-against-

Index No. 79
CIV. 747 (JBW)

DOW CHEMICAL CO., MONSANTO CO., HERCULES INC., T. H. AGRICULTURE & NUTRITION CO., INC., DIAMOND SHAMROCK CHEMICALS CO., UNIROYAL, INC., and THOMPSON CHEMICALS CORP.,

Defendants.

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In re,

"AGENT ORANGE"

MDL No. 381
(JBW)

Product Liability Litigation

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ORDER

The Dow Chemical Company has brought on an order to show cause asking that the $10 million reserve for indemnification of defendants established in the Agent Orange class action Settlement Agreement be released to the Agent Orange Class Assistance Program for the benefit of the class in accordance with the court's discretion. Based on the supporting Affidavit of Steven Brock dated April 27, 1994, the decisions of this Court and the Court of Appeals in *In re Agent Orange Product Liability Litigation*, 781 F. Supp. 902 (E.D.N.Y. 1991), *aff'd*, 996 F. Supp. 1425 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994), and the full

record in the ongoing indemnity proceedings in MDL No.381, the Court concludes that the indemnify reserve should immediately be released.

Indemnification of defendants for state court Agent Orange judgments is no longer a realistic possibility. Those plaintiffs who originally opted out of the class have either had their claims dismissed or have opted back into the class. As to class members who did not timely opt out of the class, the Court of Appeals has affirmed that this Court retains jurisdiction to enforce the Settlement Agreement, including in particular its provisions barring relitigation by class members. Any further state court suits by class members will not result in state court judgments because removal and transfer to MDL No. 381 will continue to be available to defendants. The Court's retained jurisdiction to enforce the Settlement Agreement, decide questions of class membership, and enforce its injunction against relitigation will continue even after all settlement funds have been distributed.

While the $10 million fund for indemnification of defendants was to be held in reserve for twenty-five years, these changed circumstances make it appropriate for the Court to exercise the discretion which it has retained over the Settlement Fund to release the $10 million reserve to the Agent Orange Class Assistance Program. The release of the reserve will permit the Class Assistance Program to continue to provide efficient and effective assistance to class members until its funds are exhausted and its operations concluded. The Court continues to retain discretion over the Settlement Fund to make indemnification payments to defendants in the future in accordance with the Settlement Agreement to the extent that funds remain available and the Court determines that such indemnification payments would be in the interest of justice. Accordingly, it is hereby

ORDERED that the $10 million indemnity reserve provided for defendants in the Settlement Agreement be

immediately released to the Agent Orange Class Assistance Program.

/s/ Jack B. Weintstein
JACK B. WEINSTEIN

Dated: April 11, 1994

[Excerpts of attachments to Opposition of Plaintiff Joe Isaacson to Defendants' Motion to Dismiss]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[stamped - Plaintiff's Exhibit A]

In re "Agent Orange" Product Liability Litigation	MDL No. 381
JOE ISAACSON AND PHYLLIS LISA ISAACSON, h/w Plaintiffs, -against- DOW CHEMICAL COMPANY, et al., Defendants.	Civ. No. 98-6383 (JBW)
DANIEL RAYMOND STEPHENSON, Plaintiffs, -against- DOW CHEMICAL COMPANY, et al.,	Civ. No. 99-3056 (JBW)

Defendants

AFFIDAVIT OF JOE ISAACSON IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I, Joe Isaacson, being duly sworn, depose and say as follows:

1. I served in Vietnam and am informed and believe that I was exposed to phenoxy herbicides, including "Agent Orange," during my tour of duty in Vietnam from September 1968 to September 1969. Among the places that I served during this period was Phan Rang Air Force base.

2. After I returned from Vietnam, I paid little attention to whether or not I had been exposed to herbicides, including Agent Orange, while serving in Vietnam.

3. Before 1996, I was unaware that the cases of veterans who claimed to have been injured by these herbicides were consolidated into a single action in Brooklyn known as In re "Agent Orange" Product Liability Litigation nor was I aware of the existence of a class action lawsuit on behalf of veterans who were exposed to herbicides.

4. Before 1996, I never filed a lawsuit related to my exposure to herbicides in Vietnam, I did not consult with any attorneys regarding my exposure to herbicides in Vietnam, I never contacted the Veterans Administration or the Department of Veterans' Affairs regarding my herbicide exposure, I belonged to no veterans' organizations, and I was not aware (and am still not aware) of being listed on any "Agent Orange" registry.

5. I do not recall ever seeing, reading or hearing any notice of a class action for herbicide-exposed Vietnam veterans, whether by direct mail or by publication, either in print, on radio, or on television.

6. I do not recall ever receiving any notice of a class which included: "[T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides .... " If I had received this notice in 1983 or 1984, I would not have believed it to have included me. This is because it was not until 1996, when I was diagnosed with non-Hodgkin's lymphoma, that I believed that I had in any way been injured by exposure to 'Agent Orange or other phenoxy herbicides' while I was in Vietnam.

7. I do not recall ever receiving any notice of a settlement of a class action on behalf of Vietnam veterans exposed to 'Agent Orange and other phenoxy herbicides' at any time. Before 1996 I was never advised in any fashion as to what effect such a settlement might have on my rights to bring a claim in the future. Having not heard of such a settlement, before 1996 I certainly do not recall ever being advised of any rights to object to the terms of such a settlement or being told any particulars of the settlement, nor do I recall being advised of a right to opt out of either a class action or a class action settlement.

8. In 1996 I was employed as an assistant principal in a Middle School setting. In the late summer of 1996 I was diagnosed with non-Hodgkin's lymphoma. I am informed and believe that the Department of Veterans' Affairs has determined that my non-Hodgkin's lymphoma is connected to my service in Vietnam. Before being diagnosed with non-Hodgkin's lymphoma, I did not believe that I had suffered any injuries related to my exposure to Agent Orange and other phenoxy herbicides in Vietnam. I do believe that my non-Hodgkin's lymphoma is related to my exposure to phenoxy herbicides in Vietnam.

9. It was only after being diagnosed with non-Hodgkin's lymphoma that I became aware of the existence of a class action and a class action settlement on behalf of Vietnam

veterans which took place around 1984. I further became aware that at the time of my diagnosis neither I nor my heirs would be able to receive any funds from that particular settlement, because all settlement funds had been paid out without preparing for the fact that I and other veterans might get cancer from Agent Orange after 1994. I, therefore, have not received any payments from what I understand to have been called the Agent Orange Veterans' Payment Program.

10. I also am not aware of having received any benefits related to my Vietnam 'Agent Orange and phenoxy herbicide' exposure from any organization funded by what has been called the Agent Orange Class Assistance Program.

11. I therefore am not aware of having received any compensation in any form from any corporation that manufactured the phenoxy herbicides that I was exposed to which caused my cancer.

I verify under penalties of perjury that the foregoing is true and correct.

/s/ Joe Isaacson
Joe Isaacson

State of New Jersey, County of Ocean, Subscribed and sworn to before me on November 21, 1999 by Joe Isaacson.

Rose Janowski
November 21, 1999
[notary seal]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Stamp: Plaintiffs Exhibit B]

MICHAEL F. RYAN, et al, Plaintiffs, vs. DOW CHEMICAL COMPANY, et al., Defendants.	*	79 CV 747 (JBW)
In Re: "AGENT ORANGE" Product Liability Litigation	*	MDL No. 381
JOE ISAACSON, et al., Plaintiffs, vs. DOW CHEMICAL COMPANY, et al., Defendants.	*	Civ. No.: 98-6383 (JBW)

AFFIDAVIT OF LAURA WELCH

I, Laura S. Welch, with personal knowledge hereby declare and affirm under penalties of perjury the following:

1. My name is Laura Welch and I am over the age of eighteen years.

2. I am a medical doctor, certified in occupational and environmental medicine.

3. I have held faculty positions at the Albert Einstein School of Medicine, Yale University and George Washington

University. I have published over 50 peer reviewed articles or book chapters in the field of occupational and environmental medicine. (A true and correct copy of my curriculum vitae is attached hereto as Exhibit "A.")

4. I am familiar with the process by which the scientific and medical community and governmental and quasi-governmental agencies assess the questions about whether the exposure to a particular substance has adverse human health effects.

5. I have followed the opinions of the medical and scientific community regarding potential health effects to Viet Nam veterans of exposure to the phenoxy herbicides which were sprayed in Viet Nam, including the 2,4,5-T and 2,4-D combination known as "Agent Orange."

6. During the decade beginning 1975 through 1985, the scientific community tried to determine whether exposure to these chemicals led to adverse health effects in Viet Nam veterans. Much of this analysis relied upon occupational studies of herbicide sprayers and manufacturing workers.

7. At the time it was believed, based upon toxicological studies, that "dioxin," which was a contaminant of many of these herbicide combinations was a potent carcinogen. (See, for example, Kociba, R.J., D.G. Keyes, J.E. Beyer, R.M. Carreon, C.E. Wade, D.A. Dittenber, R.P. Kalnins, L.E. Frauson, C.N. Park, S.D. Barnard, R.A. Hummel, and C.G. Humiston " Results of a two-year chronic toxicity and oncogenicity study of 2,3,7,8-tetrachlorodibenze-p-dioxin in rats". Toxicity And Applied Pharmacology, 469: 279-303 (1978).)

8. However, during that time, there was insufficient data to evaluate fully the human health effects of such herbicide exposure. Because there was very little data and what existed was based on small sample sizes and limited exposure characterization, as is typical in the early stages of these kinds of inquiries, the data available for human effects left the question as to whether there were such health effects

inconclusive with the notable exception of skin condition called chloracne.

9. Before 1984, to the extent that there were any human cancers caused by these herbicide combinations, most of the studies in existence at the time suggested the possibility of a relationship to either soft-tissue sarcomas or non-Hodgkin's lymphomas. (See, for example: Ericksson, M., L. Hardell, N.O. Berg, T. Moller, and O. Axelson. "Case-control study on malignant mesenchymal tumors of the soft tissue and exposure to chemical substance." Lakartidningen 76: 3872-75, 1979; Ericksson, M., "Soft tissue sarcomas and exposure to chemical substances: A case referent study," British Journal of Industrial Medicine, 38: 27-33 (1981); Ericksson M., Hardell L., Berg N.O., Moller T., Axelson O., "Soft tissue sarcomas and exposure to chemical substances: a case reference study," Br. J. Indust. Med. 38: 27-33 (1981); Honchar, P.A and Halperin, W.E., "2,4,5-T, trichlorophenol, and soft tissue sarcoma." Lancet 1: 268-269 (1981); Johnson, F.E., Kugler, M. A., Brown, S.M., "Soft tissue sarcomas and chlorinated phenols," Lancet 2: 40 (1981); Fingerhut, M.A., Halperin, W.E., Honchar, P.A., Smith, A.B., Groth, D.H., and Russell, W.O., "An evaluation of reports of dioxin exposure and soft tissue sarcoma pathology among chemical workers in the United States," Scand. J. Work Environ. Health 10: 299-303 (1984); Fingerhut, M.A. and Halperin, W.E. "Dioxin exposure and sarcoma," J. of the Am. Med. Assn. (JAMA) 249: 3176-3177 (1983); Cantor, K.P. "Farming and Mortality from Non-Hodgkin's Lymphoma: a case-control study," Int. J. Cancer. 29: 239-247 (1982); Sarma PR, Jacobs, J. "Thoracic soft-tissue sarcoma in Vietnam veterans exposed to Agent Orange," New England J. Med 306 (18) 1109 (1982); Bishop, C.M. and Jones, A.H., "Non-Hodgkin Lymphoma of the Scalp in Workers exposed to Dioxins," Lancet 2: 369 (1981); Hardell, L., Sandstrom, A., "Case-control study: Soft tissue sarcomas and exposure to phenoxyactic acids or chlorophenols," Br. J. Cancer 39: 711-717 (1979); Hardell,

L., Erickson, M., Lenner, P., and Lundgren, E., "Malignant lymphoma and exposure to chemicals, especially organic solvents, chlorophenols and phenoxy acids: a case-control study," Br. J. Cancer 43: 169-176 (1981); Buesching, D.P. and Wollstadt, L., "Cancer Mortality among Farmers. JNCI 72: 503-504 (1984); Fingerhut, M.A., Halperin, W.E., Honchar, P.A., Smith, A.B., Groth, D.H., and Russell, W.O., "An evaluation of reports of dioxin exposure and soft tissue sarcoma pathology among chemical workers in the United States," Scand. J. Work Environ. Health 10: 299-303 (1984); Hardell, L., "Relation of soft-tissue sarcoma, malignant lymphoma and colon cancer to phenoxy acids, chlorophenols, and other Agents." Scand. J. Work Environ. Health 7: 119-130 (1981); Moses, M. and Selikoff, I.J. "Soft tissue sarcomas, phenoxy herbicides, and chlorinated phenols," Lancet 1:1370 (1981); and Ollsson, H. and Brandt, L., "Non-Hodgkin's lymphoma of the skin and occupational exposure to herbicides," The Lancet, p. 579, Sep. 12 (1981).)

10. However, though suggestive, these studies and reports were inadequate to come to scientific conclusions regarding the human carcinogencity of the phenoxy herbicides used in Viet Nam. The problems with the studies varied. For example, if the size of the group is small, a study can only detect a large increase in risk. If the exposure assessment is not adequate, misclassification of exposure can occur.

11. Subsequently, Pl 98-542 mandated the National Academy of Sciences to create a scientific review process that began with the National Academy of Sciences and outside expert panelists reviewing the large body of scientific literature in order to assess scientific knowledge regarding the health effects of the herbicides sprayed in Viet Nam.

12. The resulting report of the National Academy of Sciences' Institute of Medicine includes a rigorous peer reviewed investigation of all scientific data, weighing the strength and validity of such data. The results of this process

are reported in two reports entitled Veterans and Agent Orange, one dated 1994 and the other dated in 1996. Current information about this project and the drafts of the latest study are available on the Internet site of the National Academy of Sciences.

13. The conclusion of the reports of the Institute of Medicine of the National Academy of Sciences indicate that there are eleven diseases that have been concluded by the scientific literature to be causally related to phenoxy herbicide exposure. These different diseases are each discussed in the reports and the strength of the data regarding each disease is presented. Non-Hodgkin's lymphoma is in the category of those diseases for which the scientific literature has the strongest association between the disease and phenoxy herbicide exposure.

14. These reports show very powerfully that the scientific community today has a very much more advanced view regarding the diseases caused by phenoxy herbicide exposure than a decade ago. At the time that the original litigation in In RE: Agent Orange took, it was a credible scientific position to state that other than chloracne there were few, if any, diseases for which there was sufficient, widely accepted evidence in the scientific community, demonstrating that phenoxy herbicides were a causative agent. At this point, because we have much more information, the scientific view has reversed 180 degrees and there is a high degree of consensus that certain phenoxy herbicide exposures is related to cancer of particular types, such as non-Hodgkin's lymphoma and soft-tissue sarcomas, among others.

15. The development of knowledge decades after exposure is typical for diseases for which there is a latency period, including virtually all types of cancer. Because of the latency period that exists between exposure to a hazardous substance and the onset of cancer, it can take decades before health effects occur, and even longer before they are

observable in study populations. The concept of latency for carcinogenesis and the fact that this could take decades — often in excess of thirty years — has been known since well before 1984. For instance, there are many other such exposure-response relationships that took years to occur and even more years to become apparent because of latency periods, including the links between asbestos and mesothelioma, benzene and leukemia, and even tobacco and lung cancer.

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LAURA WELCH

District of Columbia, SS:

SUBSCRIBED and SWORN to before me this 22nd day of November, 1999.

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Notary Public

My Commission Expires: October 14, 2002 [notarial seal]

Curriculum Vitae

Laura Stewart Welch

PERSONAL DATA:

Office address: Section of Occupational and Environmental Medicine
Department of Medicine
The Washington Hospital Center
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Washington, D.C. 20010

Telephone: 202-877-5466

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Birthdate: November 27,1951
New York, New York

Citizenship: USA

Social Security 118-44-2896

EDUCATION:

BA with distinction, 1974, Swarthmore College, Swarthmore, PA

M.D.,1978, State University of New York at Stony Brook, Stony Brook, New York

Residency in Internal Medicine, 1978-1981, Montefiore Hospital, New York, New York

Professional Registration, Licenses

Licensure: District of Columbia

Certification: American Board of Internal Medicine (1981)
American Board of Preventive Medicine - Occupational Medicine (1990)

ACADEMIC APPOINTMENTS:

Adjunct Professor of Environmental and Occupational Health School of Public Health and Health Services, George Washington University	1997-present

Chair, Department of Environmental and Occupational Health School of Public Health and Health Services, George Washington University	1997
Professor of Medicine and Health Care Sciences The George Washington University School of Medicine	1995 - 1997
Associate Professor of Medicine and Health Care Sciences The George Washington University School of Medicine	1989 - 1995
Assistant Professor of Medicine The George Washington University School of Medicine	1985 - 1989
Assistant Professor of Health Care Sciences The George Washington University School of Medicine	1988 - 1989
Assistant Professor of Medicine Yale University School of Medicine	1982 - 1985
Instructor, Department of Medicine Montefiore Hospital, NY, NY	1981-1982
Instructor, Department of Community Medicine Albert Einstein College of Medicine, NY, NY	1981 - 1982
Chief Resident, Residency Program in Social Medicine Montefiore Hospital, NY, NY	1980 - 1981

Societies and honors:

Membership: Delta Omega Society
American Public Health Association

Society for Occupational and Environmental Health
Association of Occupational and Environmental Clinics

Fellowships: American College of Occupational and Environmental Medicine
American College of Physicians

Administrative appointments (intramural and extramural):

Chief, Section of Occupational & Environmental Medicine The Washington Hospital Center	1997-present
Director, Division of Occupational & Environmental Medicine The George Washington University School of Medicine	1988 - 1997
Director, Occupational Medicine Program The George Washington University School of Medicine	1985 -1988
Director, Occupational Health Clinics Metropolitan Washington Airports	1985 -1993
Medical Director, Employees Health Service The George Washington University Hospital	1985 - 1988
Co-director, Occupational Medicine Clinic Yale University School of Medicine	1982 - 1985
Medical Director, Occupational Medicine Clinic Montefiore Hospital, NY, NY	1981-1982
Governing Council. American Public Health Association	1984-1987

Action Board, American Public Health Association	1985 - 1987
Governing Council, Society for Occupational and Environmental Health	1986 - 1989
President, Association of Occupational and Environmental Clinics (AOEC)	1987-1991
Treasurer, AOEC	1991-1993
Chair, Quality Assurance Committee, AOEC	1993 - 1995
Member, Quality Assurance Committee, AOEC	1995 -present
Chairperson, Safety Committee, George Washington Hospital	1995 - 1997
Parliamentarian, George Washington University	1993-1997
Medical Center (GWUMC) Faculty Senate Quadrennial Review Committee, GWUMC	1992-3, 1996-7
Committee on the Status of Women, GWU	1996-7
Search Committee for Chair of the Department of Psychiatry	1996-7
Appointment and Promotions Committee, School of Medicine, George Washington University	1996-7
Appointment and Promotions Committee, School of Public Health, George Washington University	1996-7

Consulting and teaching (selected):

Medical Consultant, International Chemical	1982 -

Workers Union	1985
Ohio State Labor College - lecturer in Occupational Health	1983, 1984
Peer Review Committee, Centers for Disease Control studies of:	
(1) health effects of 2,4,7,8-TCDD (dioxin).	1985
(2) reproductive health effects of 2,4,7,8-TCDD	1987
(3) body burden study of 2,4,7,8,-TCDD	
Peer Review Committee, Love Canal Habitability Criteria Document for the EPA and New York State.	1986
Medical Consultant, Sheet Metal Occupational Health Institute	1985-present
Medical Consultant, Laborers International Union of North America (LIUNA)	1987 - 1992
Invited participant, Keystone Center Project on Occupational Disease Reporting	1987 - 1988
Consultant, National Institutes of Health	1988 - 1993

Occasional Reviewer for:
American Journal of Industrial Medicine
Journal of Occupational and Environmental Medicine
Environmental Research
American, Journal of Epidemiology
Journal of the American Medical Women's Association
Toxicology and Industrial Health

NIH Study Section for Occupational Safety and Health	1989
Member, Injury Control Research Centers	1999

review panel, CDC	
Editorial Board, *Environmental and Nutritional Interactions*	1992-present
Editorial Board, *The Guides Newsletter,* American Medical Assn.	1997-present
Editorial Board, *Official Disability Guidelines,* Work-Loss Institute	1997-present
Member of ergonomics task force, Occupational Safety and Health administration	1993-4
Member, National Occupational Research Agenda (NIOSH)	1997-present

Grants and Contracts (since 1990):

1) Investigation of Asbestos-Related Disease in Sheet Metal Workers Sheet Metal Occupational Health Institute. 1985 - present.
2) Mortality in Workers with Intermittent Asbestos Exposure: Investigation of Asbestos-Related Disease in Sheet Metal Workers. National Institute of Occupational Safety and Health (NIOSH), 1995-8.
3) Co Principal Investigator: Health and Safety Programs in Construction. CPWR/NIOSH 1995-1999.
4) Former Workers' Notification and Medical Screening: Hanford Building Trades. CPWR/Department of Energy (DOE). 1996-9
5) Former Workers' Notification and Medical Screening Oak Ridge Building Trades. CPWR/Department of Energy (DOE). 1996-9
6) Former Workers' Notification and Medical Screening. Savannah River Building Trades. CPWR/Department of Energy (DOE). 1997-9

7) Co Principal Investigator Work-related musculoskeletal disease in construction workers. CPWR/NIOSH 1992-1995.
8) Co Principal Investigator : Investigation of task variability among sheet metal workers. NIOSH 1994-6
9) Longitudinal surveillance of workers with hazardous exposures. Marine Spill Response Corporation. 1993-1996
10) Principal investigator: Chronic Bronchitis in Sheet Metal Workers. American Lung Association. 1989 - 1991.
11) Investigator of a Leukemia Cluster. Department of Health and Human Services. District of Columbia 1990.

Publications:

Welch, LS, Hunting KL, and Nessel-Stephens, L. Chronic symptoms in construction workers treated for musculoskeletal injuries. Amer J Ind Med 36:532-540 1999

Hunting KL, Welch LS, Nessel-Stephens L, Anderson J, and Mawadeku A. Surveillance of construction worker injuries: utility of trade specific analysis. Applied Occ Env Hyg 14:458-469 1999

Welch LS, Hunting KL, Weeks JL Fatal and Non-Fatal Injuries from Vessels Under Air Pressure in Construction. J Occ Env Med 41:100-104, 1999

Welch LS, Hunting KL, Schiffman A, Balmes J, Bresnitz E, Guidotti T, Lockey J, Mahelc W, Myo-Lwin T. Variability In The Classification Of Pneumonoconioses Using The 1980 International Labor Organization Classification System For Pneumoconioses. Chest 114:1740-48 1999

Sokas RK, Simmens S, Sophar K, Welch LS, and Liziewski T. Lead levels in Maryland construction workers. Am J Ind Med 31:188-194 1997

Schrader SM, Turner TW, Simon SD, Ratcliffe J, Welch LS, Simon, SD. Combining reproductive studies of men exposed to 2-ethoxyethanol to increase statistical power. Occupational Hygiene, 2:411-414 1996

Hunting KL, Longbottom H, Kalavar SS, Stern F. Schwartz E, Welch LS. Haematopoietic cancer mortality among vehicle mechanics. *Occup Environ Med* 52:673-378, 1995.

Welch LS, Hunting KL, Kellogg, J. Work-related musculoskeletal symptoms among sheet metal workers. Amer J Ind Med 27:783-791 1995.

Nessel-Stephens L, Welch LS, Weeks JS, Hunting KL, Cardenas-Amaya J. Carbon monoxide poisoning from use of gasoline powered power washers in an underground parking garage. MMWR, 44 (18):356-364, May 12, 1995

Schrader SM, Ayers-Cumbow M. Turner TW, Simon SD, Ratcliffe J, Welch LS, Grajewski B and Weyandt T. Semen quality across populations. Molecular Andrology 7(107):105-122, 1995

Sokas RK, Kolb LS, Welch LS, Chang L, Horowitz BC, E1-Bayoumi J. A Single-session Exercise to Address Medical Residents' Attitudes toward Work Disability Evaluations. Academic Medicine, 70:167 1995

Welch LS, Michaels D, and Zoloth S. Asbestos-Related Disease among Sheet Metal Workers. American Journal of Industrial Medicine 25:635-48, 1994

Hunting KH, Nessel-Stephens L, Sanford SM, Shesser R, Welch LS. Surveillance of construction worker injuries through an urban emergency department. Journal of Occupational Medicine 36:356-364, 1994

Hunting KL, Welch LS. Cuccherni BA, Seiger LS. Musculoskeletal symptoms among electricians. *Amer J Ind Med* 25:149-63, 1994

Paul M, and Welch LS: Improving education and resources for health care providers: Occupational and environmental reproductive hazards. Environmental Health Perspectives, Vol 110 Supp 2:191-198,1993

Hunting KL, Welch LS. Occupational exposure to dust and lung disease among sheet metal workers. *Brit Indust Med* 50:432-442,1993.

Welch LS, Sokas RK Development of Multiple Chemical Sensitivity of an Outbreak of Sick Building Syndrome. Toxicology and Industrial Health Vol 8(4) 47-50 1992

Cottrell A, Schwartz F, Sokas R, Kofie V, Welsh, L. Surveillance of Sentinel Occupational Mortality in The District of Columbia: 1980 1987. American Journal of Public Health. Vol 82 pp 117-119 1992

Figueroa, Gerstenhaber B, Welch LS, Klimstra D, Smith GJW, Beckett W. Fatal Hard Metal Interstitial Pulmonary Disease Associated with a Form of Welding in a Metal Parts Coating Plant. American Journal of Industrial Medicine. 21(3) 363-374 1992

Welch LS. Occupational Asthma in: *Multiple Chemical Sensitivities*. National Academy Press 1992

Hunting KL, Welsh LS. "Occupational dust exposure and lung disease among sheet metal workers," in *Proceedings of the Ninth International Symposium on Epidemiology in Occupational Health*, Cincinnati, OH, September 23-25, 1992. LJ Fine (ed). p 491-497

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Beckett W, Figueroa S, Gerstenhaber B, Welch LS, Klimstra D, Smith GJW. Pulmonary Fibrosis Associated with Occupational Exposure to Hard Metal in a Metal-Coating Plant MMWR 41(4):65-67, January 31, 1992

Welch LS, Michaels D, and Zoloth S. Asbestos-Related Disease among Sheet Metal Workers: Preliminary Results of the National Sheet Metal Workers Asbestos Disease Screening Program. Annals of New York Academy of Sciences, Vol 64B pp 287-295 1991

Welch LS. Severity of Health Effects Associated with Building Related Illness. Environmental Health Perspectives 95 pp 67-69 1991.

Welch LS, Plotkin B and Schrader, SM. Fertility analysis of men exposed to ethylene glycol ethers; sensitivity and specificity. in press, American Journal of Industrial Medicine. 20:229-240 1991

Welch LS. Health Effects of Video Display Terminals. Journal of the American Academy of Physician Assistants. 4:395-400 1991

Teitelman A, Welsh, LS and Bracken MB. Work activity during pregnancy and risk of prematurity. American Journal of Epidemiology, 131: 104-113. 1990

Welch LS. The Role of Occupational Health Clinics in Surveillance for Occupational Disease. American Journal of Public Health, 79 (supplement): 53-58, 1989

Sparer J, Welch LS, Cullen MR, and McMannus K. Effects of exposure to ethylene glycol ethers: I: exposure evaluation. American Journal of Industrial Medicine, 14:497-508,1988

Welch LS, Schrader S. Cullen MR and Sparrer J. Effects of exposure to ethylene glycol ethers: II: Male reproductive function. American Journal of Industrial Medicine, 14:509-526, 1988

Welch LS and Cullen MR. Effects of exposure to ethylene glycol ethers: III: Hematologic function. American Journal of Industrial Medicine, 14:527-536, 1988

Welch LS. Decision-making About Occupational Reproductive Hazards. Seminars in Occupational Medicine, 1: 97-106, 1986

Cullen MR, Rado T, Waldron JA, Sparer J, Welch LS. Bone Marrow Injury in Lithographers Exposed to Glycol Ethers and Organic Solvents Used in Multi-color Offset and Ultraviolet Copy Printing Processes: Archives of Environmental Health 38:347-354 1983

Chavkin W and Welch LS. *Occupational Hazards to Reproduction: An Annotated Bibliography*. Department of Social Medicine, Montefiore Hospital, NY, NY. 1980

Silvian L and Welch LS. *Your Guide to Diabetes*. Simon and Schuster, NY, NY. 1979

Cholzt I and Welch LS. *Victim's Guide: A Handbook for Rape Victims*. Mayor's Task Force on Rape, NY, NY. 1975

In Press or Preparation:

Welch LS, Goldenhar LM, Hunting KL. Women in construction: occupational health and working conditions. JAMWA in press

Anderson JTL, Hunting KL, Welch LS. Injury and employment patterns among Hispanic construction workers. J Occup Environ Med 42: in press, 2000.

Welch, LS. Environmental Agents and Endocrinology. in: *Principles and Practices of Endocrinology and Metabolism, 3rd edition*. J.B. Lippincott Co. in press

Hunting KL and Welch LS. Shipyard Hazards, in: Sullivan, and Kreiger (eds): *Medical Toxicology of Hazardous Materials* Williams and Wilkins. in press

Welch LS, Ringen K, Englund A. and Weeks JL. Health and Safety in Construction. in: Sullivan, and Kreiger (eds): *Medical Toxicology of Hazardous Materials* Williams and Wilkins, in press

Hunting KL, McCann M, Anderson JTL, Welch LS. Causes of electrical exposure injuries and fatalities among construction workers. In preparation.

Book Chapters Reviews and Technical Reports

Welch, LS. Evaluating Impairment for Allergic Disorders. *The Guides Newsletter*, AMA, Chicago 1999

Ringen K, Englund A, Welch LS, Weeks JL and Seegal J. Health and Safety in Construction. Encyclopedia of Health and Safety, International Labour Organization. 1998

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Ringen K, Englund A, Welch LS. Weeks JL and Seegal J. Why Construction is Different, in: Ringen K, Englund A, Welch LS, Weeks JL and Seegal J (eds) Health and Safety in Construction: State of the Art Reviews in Occupational Medicine, Hanley and Belfus Philadelphia PA 10 (2):255-260, 1995

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Welch LS, Michaels DM, and Zoloth SR Asbestos-related disease among sheet metal workers. in Peters GA and Peters BJ (eds) Sourcebook of Asbestos Diseases, Vol 10, Butterworth Pub, Slem, NH 1994

Welch, LS, Hunting KL and Cuccherini BC. Health Effects of Organic Solvents. in Corn M (ed) *Handbook of Hazardous Materials*, Academic Press, 1994

Welch LS. Case Studies in Environmental Medicine: Reproductive and Developmental Hazards. The Agency for Toxic Substances and Disease Registry. 1993 Case #29.

Book review, *Chest*: *Unusual Occupational Diseases*. State-of-the Art Reviews: Occupational Medicine Vol 7(3) 1992

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Hunting KL and Welch LS. Shipyard Hazards, in: Sullivan, and Kreiger (eds): *Medical Toxicology of Hazardous Materials* Williams and Wilkins, 1992

Welch LS. Occupational Exposures and Endocrine Disorders/Reproductive Disorders in: Weeks, J., Wagner, G, and Levy, B.(eds): Preventing Occupational Disease and Injury. American Public Health Association. 1991

Welsh, LS. Environmental Agents and Endocrinology. In: *Principles and Practices of Endocrinology and Metabolism.* J.B. Lippincott Co. 1990

Welch LS (editor). Case Studies in Environmental Medicine: Vinyl Chloride. published by the Agency for Toxic Substances and Disease Registry, 1990

Welch LS (editor). Case Studies in Environmental Medicine: Methylene Chloride. published by the Agency for Toxic Substances and Disease Registry, 1990

Welch LS and Bauer W. Epidemiology of Foot and Ankle Injuries. in: Wiesel, S. *Foot and Ankle Injuries.* 1989

Welch, LS. Reproductive Hazards. The Genetic Resource, Mass Dept. of Public Health, 4 (2) 12-20, 1988

Hattis D, Welch LS, Schrader S. Male fertility effects of ethoxyethanol: A quantitative analysis. NIOSH Technical Report, 1988

Messite J and Welch LS. Occupational Health of Women Workers: An Overview. *Women and Work.* Sage Publications, Beverly Hills. CA 1987, p 2-18.

Welch LS. Occupational Endocrine and Reproductive Disorders in: Rosenstock L and Cullen MR. *Clinical Occupational Medicine.* WB Saunders. 1986

Welch LS, Hertz J, Cullen MR and Gee JBL: Occupational Lung Disease. in: *Current Pulmonology* Vol 6. Simmons DH Ed. Year Book Medical Publishers p. 137-165, 1985

Abstracts/Papers Presented at Scientific Meetings:

Evaluation of low dose sensitivity: the role of the internist, industrial hygienist, and psychiatrist. Presented at the American Public Health Association, Dallas, November 1983

Ethical dilemmas in occupational medicine. Presented at APHA regional meeting, Baltimore, April 1984

Use of Semen Analysis in the Detection of the Effect of Occupational Exposures on Fertility. Presented at APHA regional meeting, Worcester MA, April 1985

Clinical Effects of Methylene Chloride Exposure, Presented at APHA regional meeting, Rutgers, NJ. April 1986

Asbestos Surveillance Programs. Presented at the American Public Health Association Annual Meeting, New Orleans October 1987

Teitelman A, Welch LS and Bracken MB. Work Activity and Prematurity (abstract), annual meeting of the American Public Health Association, Boston MA, November 1988

Welch LS, Michaels D, and Zoloth S, Asbestos Disease in the Sheet Metal industry. (abstract). annual meeting of the American Public Health Association, Boston, MA, November 1988

Indoor Air Quality: Severity of Health Effects. EPA sponsored conference on assessment of health effects of complex mixtures in indoor air, Arlington, VA April 1990

Health Effects of Ethylene Glycol Ethers. Society for Occupational and Environmental Health Annual Meeting. Bethesda, MD, April 1990

Welch LS, Michaels D, and Zoloth S. Asbestos Disease in the Sheet Metal Industry, presented June 1990 at conference of Annals of New York Academy of Sciences: The Third Wave of Asbestos Disease

Multiple Chemical Sensitivity following an outbreak of tight building syndrome. Presented at National Workshop on MCS, Washington DC, September 1991

Hunting KL and Welch LS. Occupational Dust Exposure and Lung Disease Among Sheet Metal Workers. Epidemiology in Occupational Health, ICOH, Cincinnati, OH September 1992

Sokas RK. Simmons S. Welch LS. "Background" lead levels in construction workers. Epidemiology in Occupational Health, ICOH, Cincinnati, OH September 1992

Welch LS and Cuccherini B. Medical Surveillance for Hazardous Waste Workers, presented at annual meeting of the American Public Health Association, Washington, DC, November 1992

McGarahan S, Zoloth S, Michaels D and Welch LS. Asbestos exposure and medical symptoms in sheet metal workers. American Public Health Association, San Francisco, October 1993.

Schrader SM, Turner TW, Ratcliffe JM, Welch LS and Simon SD. Combining reproductive studies of man exposed to 2-ethoxyethanol to increase statistical power. Presented at ICOH meeting on glycol ethers. Nancy France, April 1994.

Welch, LS. Use of a passive surveillance system for construction worker injury and illness. NIOSH Symposium on Efforts to Prevent Injury and Disease among Construction Workers, Cincinnati Ohio, July 1994

Hunting KH, Nessel-Stephen L, Sanford SM, Shesser R, Welch LS. Surveillance of construction worker injuries through an urban emergency department. Presented at the American Public Health Association, New York, NY, November 1996

Hunting KL, Nessel-Stephens L, Welch, LS. Longitudinal study of musculoskeletal injuries in construction workers. Presented at the American Public Health Association, New York, NY, November 1996

Welch, LS, Hunting KL, Nessel-Stephens L. Longitudinal study of musculoskeletal injuries in construction workers. Presented at the International Ergonomics Association/International Committee on Occupational Health, Tampere Finland, July 1997

Hunting KL, Nessel-Stephens L, Welch, LS. Validity of task assessment in sheet metal workers. Presented at the International Ergonomics Association/International Committee on Occupational Health, Tampere Finland, July 1997

Welch LS, Hunting KL, Mendes M. Trade specific injury rates at a large construction project. Presented at American Public Health Association, Washington DC, November 1998

Welch LS, Hunting KL, Mendes M. Morbidity surveillance in sheet metal workers. Presented at American Public Health Association, Washington DC, November 1998

Hunting KL, Welch, LS, Anderson JTL, Mawudeku A. A follow-up study of falls among construction workers. Presented at American Public Health Association, Washington DC. November 1998

Welch LS and the NORA Musculoskeletal Team. Implementing the NIOSH-NORA agenda for work-related musculoskeletal disorders. Presented at *Work and Stress*, the American Psychological Association, Baltimore MD March 1999

Other invited papers (since 1993):

Welch LS. Medical management of cumulative trauma disorders. Presented at the Metropolitan Washington chapter of American College of Occupational and Environmental Medicine, November 1994

Welch LS. Medical management of cumulative trauma disorders. Occupational Ergonomics: Control of Work Related Upper Extremity Disorders, Charlotte, NC, Sponsored by the University of Michigan and the University of North Carolina, Jan 1995

Welch LS. Social and economic costs of injuries in construction. Metropolitan Washington Public Health Association, April 1999.

revised 7/99

Veterans And Agent Orange

Health Effects of Herbicides Used in Vietnam

Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides

Division of Health Promotion and Disease Prevention

INSTITUTE OF MEDICINE

NATIONAL ACADEMY PRESS
Washington, D.C. 1994

Foreword

In response to decades of concern surrounding the possible long-term health consequences of exposures to herbicides and the contaminant dioxin. Congress directed the Secretary of Veterans Affairs, in Public Law 102-4 signed on February 6, 1991, to request the National Academy of Sciences (NAS) to conduct a comprehensive review and evaluation of the available scientific and medical information regarding the health effects of exposure to Agent Orange and other herbicides used during the Vietnam conflict. This report from the Institute of Medicine (IOM). Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides is hereby submitted in compliance with Public Law 102-4.

Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam reviews and evaluates the available scientific evidence regarding the association between exposure to dioxin or other chemical compounds in herbicides used in Vietnam and a wide range of health effects and provides the committee's best assessment of this body of knowledge for the Secretary of Veterans Affairs to consider as the Department of Veterans Affairs exercises its responsibilities to Vietnam veterans. The report also describes areas in which the available scientific data are insufficient to determine whether an association exists and provides the committee's recommendations for areas in which future research is likely to be most productive.

That Congress would ask the NAS -- a nongovernmental organization -- to conduct this study reflects a time-honored tradition. Created by an act of Congress and signed into law in 1863 by President Abraham Lincoln, the NAS is dedicated to the furtherance of science and technology and to their

TABLE 1-1 Summary of Findings in Occupational, Environmental, and Veterans Studies Regarding the Association Between Specific Health Problems and Exposure to Herbicides

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Sufficient Evidence of an Association

Evidence is sufficient to conclude that there is a positive association. That is, a positive association has been observed between herbicides and the outcome in studies in which chance, bias, and confounding could be ruled out with reasonable confidence. For example, if several small studies that are free from bias and confounding show an association that is consistent to magnitude and directive, there may be sufficient evidence for an association. There is sufficient evidence of an association between exposure to herbicides and the following health outcomes:

Soft tissue sarcoma
Non-Hodgkin's lymphoma
Hodgkin's disease
Chloracne
Porphyria cutanea tarda (in genetically susceptible individuals)

Limited/Suggestive Evidence of an Association

Evidence is suggestive of an association between herbicides and the outcome but is limited because chance, bias, and confounding could not be ruled out with confidence. For example, at least one high-quality study shows a positive association, but the results of other studies are inconsistent. There is limited/suggestive evidence of an association between exposure to herbicides and the following health outcomes:

Respiratory cancers (lung, larynx, trachea)
Prostate cancer
Multiple myeloma

Inadequate/Insufficient Evidence to Determine Whether an Association Exists

The available studies are of insufficient quality, consistency, or statistical power to permit a conclusion regarding the presence or absence of an association. For example, studies fail to control for confounding, have inadequate exposure assessment, or fail to address latency. There is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and the following health outcomes:

Hepatobiliary cancers
Nasal/nasopharyngeal cancer
Bone cancer
Female reproductive cancers (cervical, uterine, ovarian) and breast cancer
Renal cancer
Testicular cancer
Leukemia
Spontaneous abortion
Birth defects
Neonatal/infant death and stillbirths
Low birthweight
Childhood cancer in offspring

Veterans And Agent Orange

Update 1996

Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides

Division of Health Promotion and Disease Prevention

INSTITUTE OF MEDICINE

NATIONAL ACADEMY PRESS
Washington, D.C. 1996

TABLE 2-1 Summary of Findings from *Veterans and Agent Orange* (1994) in Occupational, Environmental, and Veterans Studies Regarding the Association Between Specific Health Problems and Exposure to Herbicides

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Female reproductive cancers (breast, cervical, uterine, ovarian)
Renal cancer
Testicular cancer
Leukemia
Spontaneous abortion
Birth defects
Neonatal/infant death and stillbirths
Low birthweight
Childhood cancer in offspring
Abnormal sperm parameters and infertility
Cognitive and neuropsychiatric disorders

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
FILE NO. CV98-6383 (JBW)

JOE ISAACSON and PHYLLIS LISA ISAACSON, h/w Plaintiffs,	:	
-- against --	:	**NOTICE OF APPEAL**
DOW CHEMICAL COMPANY, MONSANTO COMPANY, AMERICAN HOME PRODUCTS, INC., THOMPSON HAYWARD CHEMICAL CO., T H AGRICULTURE & NUTRITION CO., OCCIDENTAL CHEMICAL CORP., HERCULES INC., INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL, INC., C.D.U. HOLDING, INC., UNIROYAL CHEMICAL CO., HACROS CHEMICALS, INC., ULTRAMAR DIAMOND SHAMROCK CORP., MAXUS ENERGY CORP., CHEMICAL LAND HOLDINGS, INC. , THOMSPON CHEMICALS CORPORATION, and DOES 1 through 100. Defendants.	:	[Filed Mar. 10, 2000]

Notice is hereby given that Joseph and Phyllis Isaacson, plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 17th day of February, 2000.

/s/ Mark R. Cuker
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JOE AND PHYLLIS ISAACSON — ORDER OF DISMISSAL

V — CV98-6383 (JBW)

DOW CHEMICAL CO., et al. — [Filed Feb. 17, 2000]

----------x

It is hereby ORDERED for the reasons stated orally on the record that the captioned case is dismissed.

It is further ORDERED that the clerk mail a copy of this order to all parties and mark the case closed.

/s/ Jack B. Weinstein
JACK B. WEINSTEIN
U.S.D.J.
2/14/2000

DATED:

SERVICE LIST

Joe and Phyllis Isaacson v. Dow Chemical Company, et al., No. CV98-6383(JBW)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL RAYMOND STEPHENSON
Plaintiff,

v.

DOW CHEMICAL COMPANY, et al.,
Defendants.

Civ. No. 99-3056 (JBW)
[Filed Mar. 27, 2000]

NOTICE OF APPEAL

Notice is hereby given that Daniel Stephenson, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 27th day of March, 2000.

Dated: New Orleans, LA

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been faxed to all counsel in these proceedings on this 6th day of April, 2000.

/s/ Stephen B. Murray, Jr.
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Daniel Raymond Stephenson v. Dow Chemical and Monsanto Company, USDC, EDNY Civ. No. 99-3056 (JB W)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL RAYMOND STEPHENSON
Plaintiff,

v.

DOW CHEMICAL COMPANY, et al.,
Defendants.

Civ. No. 99-3056 (JBW)
[Filed May 8, 2000]

AMENDED NOTICE OF APPEAL

Daniel Raymond Stephenson, Susan Stephenson, Daniel Anthony Stephenson and Emily Stephenson are the originally named plaintiffs in the above captioned matter. The U.S. District Court for the Eastern District of New York incorrectly lodged this matter when it was transferred to the MDL 381 action from the District Court for the Western District of Louisiana on June 1, 1999. On April 7, 2000 the Notice of Appeal was filed with the U.S. District Court for the Eastern District of New York and the caption failed to indicate more than one named plaintiff.

Therefore, Daniel Raymond Stephenson, Susan Stephenson, Daniel Anthony Stephenson and Emily Stephenson amends their Notice of Appeal previously filed by correcting the caption to include all originally named plaintiffs in their appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 27th day of March, 2000.

Dated: New Orleans, LA

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been faxed to all counsel in these proceedings on this 5th day of May, 2000.

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Daniel Raymond Stephenson v. Dow Chemical and Monsanto Company, USDC, EDNY Civ. No. 99-3056 (JBW)

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April 6, 2000

Via Telecopy

Ms. June Lowe
Chambers of the Honorable Jack B. Weinstein
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *In re Agent Orange Product Liability Litigation, MDL No. 381; Isaacson v. Dow Chemical Co., et al., Civ. No. 98-6383; Stephenson v. Dow Chemical Co., et al., Civ. No. 99-3056*

Dear Ms. Lowe:

As we discussed, I enclose for Judge Weinstein's signature an order and judgment with attached transcript of proceedings in the above actions, which has been approved by all counsel as to form.

Please call me if you have any questions or if I can be of any further assistance.

Very truly yours,

/s/ Steven Brock
Steven Brock

SB/jh
enc.
cc: All Counsel w/enc.

[Enclosure]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL R. RYAN, et al. Plaintiffs, -against- DOW CHEMICAL COMPANY, et al. Defendants.	:	79 CV 747 (JBW)
In re "AGENT ORANGE" Product Liability Litigation	:	MDL NO. 381
JOE ISAACSON and PHYLLIS LISA ISAACSON, Plaintiffs, -against- DOW CHEMICAL COMPANY, et al. Defendants.	:	Civ. No. 98-6383 (JBW)
DANIEL RAYMOND STEPHENSON, et al. Plaintiffs, -against- DOW CHEMICAL COMPANY, et al. Defendants.	:	Civ. No. 99-3056 (JBW)

ORDER AND JUDGMENT

The Court heard argument on defendants' motion to dismiss in the above-captioned actions on December 13, 1999. A copy of the transcript of proceedings is attached hereto. Upon consideration of that argument and all pleadings, motions, proceedings, and the full record in MDL-381 and in the above-captioned actions, it is hereby

ORDERED that defendants' motion to dismiss is GRANTED, and

IT IS FURTHER ORDERED that the complaints and any and all amendments thereto filed in *Isaacson v. Dow Chemical Company, et al.*, Civ. No. 98-6383 (JBW) and *Stephenson v. Dow Chemical Company et al.*, Civ. No. 99-3056 (JBW), shall be dismissed as against all defendants with prejudice and without costs assessed to any party.

Dated: April ____, 2000

_____
HON. JACK B. WEINSTEIN

RECEIVED
DEC 27 2002

(5)

Supreme Court, U.S.
FILED
DEC 18 2002
OFFICE OF THE CLERK

No. 02-271

In the Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:
DOW CHEMICAL COMPANY, MONSANTO CHEMICAL, ET. AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. Whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members had a full opportunity to opt out, object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class.

2. Whether, if collateral attack is permissible, the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of events and changes in the law occurring years after the settlement has become final and all of the settlement proceeds have been disbursed.

PARTIES TO THE PROCEEDING

Petitioners:

Dow Chemical Company

Monsanto Company

Hercules Incorporated

Occidental Chemical Corporation

Ultramar Diamond Shamrock Corporation

Chemical Land Holdings, Inc.

Maxus Energy Corporation

Harcros Chemical, Inc.

Thompson-Hayward Chemical Company

T H Agriculture & Nutrition Company, Inc.

C.D.U. Holdings, Inc.

Uniroyal, Inc.

Uniroyal Chemical Company

Respondents:

Daniel Raymond Stephenson

Susan Stephenson

Daniel Anthony Stephenson

Emily Elizabeth Stephenson

Joe Isaacson

Phyllis Lisa Isaacson

The disclosure statement required by Rule 29.6 appears in the petition for a writ of certiorari.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 273 F.3d 249. The orders of the district court (Pet. App. 23a-26a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2001, and a timely petition for rehearing was denied on May 8, 2002. On July 29, 2002, Justice Ginsburg extended the time for filing a petition for a writ of certiorari until August 20, 2002. The petition was granted on November 4, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * * ."

Rule 23(a) of the Federal Rules of Civil Procedure provides in relevant part: "One or more members of a class may sue or be sued as representative parties on behalf of all only if * * * (4) the representative parties will fairly and adequately protect the interests of the class."

STATEMENT

This litigation involves a "mass tort" suit that was brought as a class action nearly twenty-five years ago. In that case, the district court, after considering and rejecting numerous challenges to the appropriateness of class treatment, certified a class in 1983 upon finding that all prerequisites for class action treatment (including adequacy of representation) had been met. The parties settled the case in 1984, and a final judgment was entered that (1) required the defendants – now petitioners in this Court – to pay $180 million into a fund to be distributed by the district court for the benefit of the class and (2) permanently barred all class members from instituting against any of the

defendants actions that relate to the subject matter of the complaint. The court of appeals upheld the settlement and affirmed the judgment in 1987, specifically rejecting a challenge to the adequacy of the class representation. Petitioners paid almost $200 million for the benefit of the class members.

In 1998, fifteen years after the class was certified, more than ten years after the judgment became final on appeal, and several years after all of the settlement funds had been disbursed, two members of the plaintiff class – now respondents in this Court – brought a new suit against petitioners, arguing that they had not been adequately represented at the time the class was certified and therefore should not be bound by the class judgment. In particular, respondents contended that class representation must have been inadequate because, as matters turned out, they did not receive benefits from the settlement as great as those received by certain other class members. The court of appeals agreed, holding (1) that class members who contest the adequacy of representation may collaterally attack class certification decisions long after the case is resolved and (2) that in such a collateral challenge the court should determine the adequacy of representation not as of the time of the original litigation, but in light of events and changes in the law occurring years after the settlement became final. The question now before the Court is whether those holdings were correct.

1. Beginning in the late 1970s, suits were brought on behalf of Vietnam veterans and their families against petitioners, manufacturers of the herbicide Agent Orange, which petitioners supplied to the United States Government in compliance with military specifications for use as a defoliant. The suits alleged that exposure to Agent Orange had caused (and would cause in the future) a variety of illnesses. Despite the understandably "strong emotions these proceedings have generated" and the "grievous medical problems" experienced by many veterans and their families (*In re "Agent Orange" Prod. Liab. Litig.*,

818 F.2d 145, 147, 149 (2d Cir. 1987) ("*Agent Orange I*"), cert. denied, 484 U.S. 1004 (1988)), the courts entertaining the Agent Orange suits consistently have indicated that "the most noticeable fact [about them] is the pervasive factual and legal doubt that surrounds the plaintiffs' claims." *Id.* at 149.

The plaintiffs' factual and legal position suffered from a number of serious and common weaknesses. Among them was (1) a complete absence of evidence that exposure to Agent Orange caused the plaintiffs' illnesses, and (2) petitioners' entitlement to complete immunity under the government contractor defense. See *Agent Orange I*, 818 F.2d at 171-174. Then-Chief Judge Weinstein of the Eastern District of New York, who presided over the eventual settlement of the first round of Agent Orange litigation, thus "viewed the plaintiffs' case as so weak as to be virtually baseless." *Agent Orange I*, 818 F.2d at 151. The Second Circuit echoed that belief when it affirmed the decision approving the settlement, noting "the pervasive difficulties faced by plaintiffs in establishing liability." *Ibid.* Indeed, Chief Judge Weinstein dismissed on the merits the claims of class members who opted out of the class to pursue individual actions (see *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985)), a decision that was upheld by the Second Circuit on appeal. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988).

2. a. The first Agent Orange suit was brought in New York state court in 1978, removed to federal court, and transferred to the Eastern District of New York. Other individual and class complaints followed. In 1979, the Judicial Panel on Multidistrict Litigation consolidated the suits in the Eastern District of New York, where the litigation was assigned to then-District Judge Pratt. Ultimately, almost 600 class and individual actions became part of the Agent Orange MDL proceeding. See *Agent Orange I*, 818 F.2d at 152-153. The lead class action sought relief for a class of almost 2.5 million veterans who served in Vietnam between 1961 and 1972, including both veterans who

were then sick and the much larger group who were asymptomatic but assertedly were "at risk" of becoming ill because they had been exposed to Agent Orange. See, *e.g.*, Pl. Rep. Mem. on Class Certification (Oct. 17, 1979), JA 47-49 (taking the position that all Vietnam veterans "sustained some personal injury"). The class suit also sought relief for certain of the veterans' family members.

In 1980, Judge Pratt turned to the question whether the class should be certified. Although the defendants opposed certification, Judge Pratt, after a detailed analysis, conditionally granted the plaintiffs' request to certify a class of "all persons exposed to Agent Orange and various members of their families" – a group that expressly was understood to include both ill and asymptomatic veterans. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 787 (E.D.N.Y. 1980). See *id.* at 787-791. The court observed that, "[b]efore a class action may be maintained under Rule 23, the action must meet the prerequisites of Rule 23(a) and one set of the alternate requirements of Rule 23(b)." *Id.* at 787. Of particular importance here, Judge Pratt carefully considered the requirements of Rule 23(a)(4), recognizing that "[a]dequacy of representation depends on * * * the absence of antagonism or conflicting interests, and a sharing of interests between class representatives and absentees." *Id.* at 788. Finding adequacy and the other elements of Rule 23(a) satisfied, Judge Pratt determined that class action treatment was appropriate under Rule 23(b)(3). 506 F. Supp. at 790, 791. See *Agent Orange I*, 818 F.2d at 153.

In 1983, after Judge Pratt was appointed to the Second Circuit, Chief Judge Weinstein of New York's Eastern District assumed responsibility for the Agent Orange litigation. Because Judge Pratt had not entered a formal certification order, Chief Judge Weinstein revisited the question of class certification and – again over the defendants' objections – ultimately concluded that "in the instant litigation * * * the desirability of class certification [is] even greater than it would

be in most mass tort litigation." *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 720 (E.D.N.Y. 1983). Chief Judge Weinstein specifically noted that "[t]he four prerequisites [of Fed. R. Civ. P. 23(a)] have already been carefully analyzed by the court and found to exist." *Id.* at 721. The court then concluded that certification was proper pursuant to Rule 23(b)(3) because "the affirmative defenses and the question of general causation are common to the class" and "those questions predominate over any questions affecting individual [class] members." *Id.* at 724.

Chief Judge Weinstein defined the plaintiff class broadly to include:

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides * * *. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

100 F.R.D. at 729. Again, this class was recognized by the court and the parties to include both ill and unimpaired veterans; under the plaintiffs' theory, all Vietnam veterans exposed to Agent Orange had suffered a legally cognizable "injury," even if they had not manifested symptoms.[1]

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[1] See, *e.g.*, Tr. of Oral Arg. Before Special Master Sol Schreiber, Aug. 24, 1982 (JA 55-59 (statement by lead plaintiffs' counsel that all 2.5 million Vietnam veterans had suffered injury and were members of the class); Pl. Second Supp. Mem. on Class Definition & Supp. Mem. on Generic Causation, Sept. 12, 1983 (JA 70; see also *id.* at 71-74) (urging definition of class that "will be dispositive to all present and potential claimants"); Tr. of Oral Arg. at 46, MDL No. 381 (E.D.N.Y. Nov. 7, 1983) (Chief Judge Weinstein stating that "[a]nybody in Vietnam during this period is prospectively within the class").

Chief Judge Weinstein also ordered that notice of the pendency of the action – and of the class members' right to opt out of the suit until May 1, 1984 – be provided to the class in several ways:

- Written notice was mailed to all persons who had filed or intervened in Agent Orange actions, who were represented by counsel associated with the plaintiffs' management committee, or who were "listed on the United States Government's Veteran's Administration 'Agent Orange Registry.'" 100 F.R.D. at 729.[2]

- Plaintiffs' counsel were to arrange for announcements to be read over the national television networks and on radio stations "with a combined coverage of at least 50 percent of the listener audience in each of the top one hundred radio markets in the United States." *Id.* at 730.

- Plaintiffs' counsel were to publish the notice in two successive weeks (except in the case of monthly publications) in the nationwide edition of *The New York Times*, *USA Today*, *Time Magazine*, *The American Legion Magazine*, *VFW Magazine*, *Air Force Times*, *Army Times*, *Navy Times*, and the *Leatherneck*; in the ten largest circulation newspapers in Australia; and in the five largest circulation newspapers in New Zealand. *Id.* at 730.

- The court's clerk sent the class notice to every state governor, asking that it be referred to "any state organization created by the executive or legislative

[2] The Agent Orange Registry maintained by the Veterans Administration (now the Department of Veterans Affairs) included the records of medical examinations, diagnostic tests, and health care evaluations provided to veterans concerned about the possible effects of exposure to Agent Orange. See P. SCHUCK, AGENT ORANGE ON TRIAL 24 (1987). At the time of class certification in 1984, the registry contained information on approximately 130,000 veterans.

> branches dealing with the problems of Vietnam veterans and request[ing] that the notice be sent to all those known Vietnam veterans who may be members of the class." *Id.* at 730-731.

Chief Judge Weinstein found that this notice "is the best reasonable and practicable notice under the circumstances of this litigation." *Id.* at 731. He scheduled trial for May 7, 1984.

b. As the trial date approached, the parties engaged in "arm's length and adversarial, even fierce" settlement negotiations with the assistance of three special masters appointed by Chief Judge Weinstein. *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1436 (2d Cir. 1993) ("*Ivy/Hartman*"), cert. denied, 510 U.S. 1140 (1994); see *Agent Orange I*, 818 F.2d at 155; P. SCHUCK, AGENT ORANGE ON TRIAL 144-166 (1987). The parties reached a settlement agreement early in the morning of May 7, 1984, on the eve of trial. *Agent Orange I*, 818 F.2d at 155. The settlement provided that the defendants would pay a lump sum of $180 million into a fund to benefit the plaintiff class but did not provide for the formula to be used to distribute the settlement proceeds. See *ibid.* The settlement specified that "all members of the Class are forever barred from instituting or maintaining any action against any of the defendants * * * arising out of or relating to, or in the future arising out of or relating to, the subject matter of the Complaint," and also made express that "[t]he class specifically includes persons who have not yet manifested injury." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 864-65 (E.D.N.Y. 1984).

Chief Judge Weinstein, in an unprecedented outreach to the class members, then scheduled eleven days of hearings on the fairness of the settlement, to be conducted in New York, Chicago, Houston, Atlanta, and San Francisco. See 597 F. Supp. at 866. He ordered plaintiffs' counsel to mail notice of the proposed settlement and of the hearings to "all members of the class known to [them]," and also directed counsel to publish

the notice in specified general interest and armed forces newspapers. See *id.* at 866-867. Among other things, the notice indicated that "[t]he Settlement Agreement confirms that the class includes persons who have not yet manifested injury" and stated that, if the court were to approve the settlement, it would conduct further proceedings to determine the proper allocation of the settlement funds. *Id.* at 874-875.

At the fairness hearings, Chief Judge Weinstein heard from almost 500 witnesses. He also considered "hundreds of written communications from veterans, members of their families, veterans' organizations and others * * * [and] read a large part of the relevant literature, taking judicial notice of its substance." 597 F. Supp. at 748; see *Agent Orange I*, 818 F.2d at 155-156. A number of class members and their attorneys voiced concern about the provision that would be made for veterans who had not manifested symptoms, and several recommended that a subclass of objectors be certified. See, *e.g.*, JA 122-125. Chief Judge Weinstein denied this request, concluding that the views of the objectors had been taken into account and that "[n]o purpose would have been served by appointing counsel for a subclass of disappointed claimants except to increase expenses to the class and delay proceedings." 597 F. Supp. at 757.

At the close of the fairness hearings, Chief Judge Weinstein carefully reviewed and then preliminarily approved the settlement pursuant to Fed. R. Civ. P. 23(e). See 597 F. Supp. at 746-858. In finding the amount awarded to the class fair, the judge was motivated principally by his view that "the evidence presented to the court to date suggests that the case is without merit" (*id.* at 857) and that the settlement accordingly "gives the class more than it would likely achieve by attempting to litigate to the death." *Id.* at 747. In so ruling, Chief Judge Weinstein analyzed in detail the myriad and, in his view, insurmountable difficulties the plaintiffs would face in establishing liability. *Id.* at 800-850. Indeed, as is noted above (at page 2, *supra*), Chief Judge Weinstein subsequently

dismissed on the merits the claims of class members who opted out of the class. He entered a final order approving the settlement on January 7, 1985. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985), aff'd in relevant part, 818 F.2d 112 (2d Cir. 1987).

Class members subsequently moved for reconsideration. Among other things, these objectors expressly contended that "the class action representatives may have been inadequate." Mem. in Supp. of Pl. Mot. Pursuant to Rules 52(b) and 59 to Reconsider the Order of Jan. 7, 1985 (JA 144). They complained that "[n]o class representative represented class members who were deceased or who had not manifested injury"; that "[a]ll of the class representatives were living and had manifested injury"; and that "the interests of living class representatives who had manifested injury were antagonistic to the interests of those who had died and to those who had not yet manifested injury" because "[]the more money set aside for those who had died and for those who had not yet manifested injury, the less money available to those who are living and who have manifested injury." *Id.* at 144-145. Chief Judge Weinstein, after indicating that he had considered the argument and found it to lack merit, denied this motion without opinion. *Id.* at 194.

c. The court then turned to the distribution of the settlement funds. Chief Judge Weinstein conducted a public hearing on the subject – in which the defendants did not participate – where he heard from the plaintiffs' counsel, representatives of veterans organizations, and individual class members. After also receiving and "thorough[ly] reviewing" a "number of [written] submissions" (*In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1402 (E.D.N.Y. 1985); see *Agent Orange I*, 818 F.2d at 156), Chief Judge Weinstein adopted a slightly modified version of a proposal for distribution that had been offered by Special Master Kenneth Feinberg. The judge described this proposal as "an elegant solution [combining] insurance-type compensation to give as much help as possible

to individuals who, in general, are most in need of assistance, together with a foundation run by veterans with the flexibility and discretion to take care of individuals and groups most in need of help." 611 F. Supp. at 1400.

The distribution plan provided that 75 percent of the $180 million settlement fund would be distributed directly to the survivors of deceased veterans and to veterans who became totally disabled due to illness before January 1, 1995 – *i.e.*, ten years beyond the date of the settlement and more than 20 years after any possible exposure to Agent Orange. 611 F. Supp. at 1410-1412. This "compensation-based" regime did not vary according to the strength or weakness of individual claims (or of categories of claims) "because of the near impossibility of proving that any particular plaintiff's condition was caused by Agent Orange." *Id.* at 1400. Although Chief Judge Weinstein recognized that this formula would result in "[n]o payment [being] made for death or disability occurring after December 31, 1994" (*id.* at 1417), he noted that "disabilities or deaths occurring many years after service in Vietnam, or among older veterans for whom the background incidence [of illness] is higher, have a relatively diminished connection with Agent Orange exposure in terms of both public perception and the likelihood of intervening or contributing causes" (*id.* at 1418); in addition, keeping the portion of the fund dedicated to cash compensation open indefinitely would preclude the possibility of meaningful payments to acutely ill veterans who were most in need of assistance. *Id.* at 1411.

Chief Judge Weinstein set aside most of the remainder of the settlement fund to support a "class assistance foundation" run by veterans that would help class members "mobilize themselves and others to deal with their medical and related problems." 611 F. Supp. at 1432. Recognizing that "[t]he majority of claimants will not meet the eligibility criteria for cash compensation under the payment program," Chief Judge Weinstein explained that class members who were not disabled "should receive some benefit from the settlement." *Id.* at 1431.

He concluded that "[t]he most practicable and equitable method of distributing benefits to this segment of the class is through funding of services" pursuant to the class assistance foundation, as opposed to "thousands of small individual payments" that would "trivialize the beneficial impact of the settlement fund on the needs of the class." *Ibid.* The foundation was broadly directed "to fund projects to help meet the service needs of the class as a whole." *Id.* at 1437.

The district court subsequently entered judgment dismissing "on the merits, with prejudice," "all claims of each and every plaintiff and member of the Rule 23(b)(3) class." This order provided that "[e]ach and every plaintiff and member of the Rule 23(b)(3) class is hereby forever barred from instituting or maintaining any action against any of the defendants" relating to "the subject matter of any of the complaints in this class action." *Ryan* v. *Dow Chem. Co.*, 618 F. Supp. 623, 624 (E.D.N.Y. 1985).

3. Objecting class members subsequently appealed. Of particular importance here, the objectors made the very argument now advanced by respondents in this case: they contended that the class should not have been certified, arguing that the class representation was inadequate because "[t]he 'injured' class representatives failed to protect the substantive rights of all of those 'not yet manifested injury' class members who will manifest injury after the year 1995 when the settlement fund is projected to be depleted." No. 84-6273, *In re "Agent Orange" Prod. Liab. Litig.*,, Reply Br. of Appellants 16 (2d Cir.) (brief of objectors to the settlement). The court of appeals specifically rejected this contention that "the diverse interests of the class make adequate representation virtually impossible" (*Agent Orange I*, 818 F.2d at 167) and upheld the settlement.[3] In reaching this conclusion, the Second Circuit

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[3] The court of appeals ordered Chief Judge Weinstein's distribution plan modified in only two respects. It held that the class assistance foundation should be administered directly by the district court rather

voiced agreement with Chief Judge Weinstein's finding that there were no significant differences among the class members because their claims had serious common weaknesses that were central to resolution of the case. *Id.* at 166-167. The court therefore held that class representation was adequate and that the class had been properly certified. *Ibid.*

The court of appeals also held that "the notice plan adopted by Chief Judge Weinstein was fully adequate under the circumstances" (*id.* at 169) and that the settlement was fair, reasonable, and adequate. *Id.* at 170-173. In reaching this latter conclusion, the court emphasized the insubstantiality of the plaintiffs' claims, observing that, in view of the serious common legal and factual barriers to recovery, plaintiffs' counsel "had good reason to view this case as having only nuisance value." *Id.* at 171; see *id.* at 170-174. The objectors subsequently sought certiorari and this Court denied review. 484 U.S. 1004 (1988).

Relying on the finality of the settlement, petitioners paid $180 million (plus accrued interest) to resolve the class members' claims. See *Ivy/Hartman*, 996 F.2d at 1429. Distribution of the settlement proceeds began in 1988 and was largely accomplished by June 1997. During that period, 52,000 class members received $196.5 million in direct cash payments. Pet. App. 9a. The eligibility criteria established by Chief Judge Weinstein ultimately resulted in fewer that one percent of class members receiving direct payments from the settlement funds. See Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund at 1, 3-4 (Sept, 24, 1997). The class assistance foundation expended an additional $71.3 million to benefit the class as a whole. Pet. App. 9a.

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than by class members, and that the fund should be managed so that the settlement moneys eventually would be consumed in their entirety. 818 F.2d at 184-186.

4. In 1989 and 1990, two years after the class settlement became final, individual veterans brought two new putative class actions (the "*Ivy/Hartman*" suits) against petitioners, alleging that they had suffered injuries caused by Agent Orange that "did not manifest themselves or were not discovered until after May 7, 1984, the *Agent Orange I* settlement date." *Ivy/Hartman*, 996 F.2d at 1430. The cases were dismissed by Judge Weinstein, who found the claims precluded by the settlement. *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 902, 918-919 (E.D.N.Y. 1991). In particular, Judge Weinstein rejected the contention that persons who developed symptoms after 1984 had not been adequately represented in the original class litigation. He acknowledged that "[o]ne can imagine many genuine conflicts of interest between two such groups [*i.e.*, symptomatic and asymptomatic class members] within a class action," but explained that "[a]ll of the courts which considered the *Agent Orange* Settlement were fully cognizant of the conflict arguments now hypothesized by the plaintiffs and took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund." *Id.* at 919.

The court of appeals affirmed. Concluding that "the fundamental fairness of the *Agent Orange I* settlement remains unshaken" (*Ivy/Hartman*, 996 F.2d at 1437), the court accordingly held that class members who became ill after the settlement was reached were barred from pursuing individual claims against petitioners. *Id.* at 1438.

5. a. In 1998 and 1999, five years after the Second Circuit's ruling in *Ivy/Hartman*, respondents in the current litigation filed separate individual actions against petitioners. In their complaints, respondents alleged that they had become ill due to exposure to Agent Orange in Vietnam, but that their illnesses did not become manifest until after 1994, when the portion of the Agent Orange settlement providing direct cash payments to veterans had been exhausted. See Pet. App. 9a-10a. Respondents contended that their inability to receive such payments now necessarily meant that they had not been

adequately represented at the time of the class action and therefore could not be bound by the settlement. See *id.* at 13a-14a.

The cases were transferred to the Eastern District of New York and dismissed by Judge Weinstein. Pet. App. 27a-43a.[4] He noted that, at the time of the settlement, "the court held discussions with all attorneys and anyone else who wished to be heard, those who knew they were sick, those who thought they might be sick in the future * * * . The court then approved the settlement. It was appealed to the court of appeals, which approved the settlement. That is the final decision. Whether right or wrong at that time, that is the end of the case." *Id.* at 39a. Judge Weinstein added that "[y]ou have to attack directly,

[4] This case involves two consolidated actions that present identical substantive issues. One, initiated by respondent Daniel Stephenson, was brought in federal court in the Western District of Louisiana on diversity grounds; the other, initiated by respondent Joe Isaacson, was brought in New Jersey state court, removed to federal court for the District of New Jersey, and then transferred to the Eastern District of New York. See Pet. App. 10a. Isaacson sought remand of his case to state court, arguing that one of the bases for removal, the All Writs Act, 28 U.S.C. § 1651, does not independently provide for federal removal jurisdiction; that argument was rejected both by the district court and by the court of appeals. See Pet. App. 10a, 11a-12a. After certiorari was granted in this case, however, this Court held in *Syngenta Crop Protection, Inc.* v. *Henson*, 123 S. Ct. 366 (2002), that the All Writs Act does not provide an independent basis for federal jurisdiction. In light of *Syngenta*, petitioners' view is that the Isaacson case should be remanded to the district court for a determination whether the alternative ground advanced below in support of removal – the federal officer removal provision of 28 U.S.C. § 1442 – supports the exercise of federal jurisdiction. See *Winters* v. *Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998), cert. denied, 526 U.S. 1034 (1999). This Court, of course, does have jurisdiction to decide the questions presented in the petition for certiorari by resolving Stephenson's case.

not by a collateral attack some fifteen years after judgment." *Id.* at 40a.

Judge Weinstein also noted that respondents, like "[e]very veteran[,] * * * benefited" from the $71.3 million distributed by the class assistance fund, even if respondents were not among the relatively small proportion of class members who received direct cash death or disability payments. Pet. App. 42a. As Judge Weinstein explained, the class assistance fund financed a variety of programs that, among other things, contributed substantially to the passage of federal Agent Orange legislation, which continues to provide benefits to many class members – including respondent Isaacson. *Id.* at 42a-43a.

b. On appeal, the third time was the charm; the court of appeals reversed, holding that respondents were not precluded from litigating the issue of adequate representation. Pet. App. 1a-20a. The court acknowledged that its prior decisions in *Agent Orange I* and *Ivy/Hartman* "specifically rejected an attack based on adequacy of representation." *Id.* at 6a; see *id.* at 8a-9a. The court also recognized that respondents "fall within the class definition of the prior litigation." *Id.* at 18a. The court nevertheless believed that this case required it "to determine the effect of the Supreme Court's landmark class action decisions in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), on a previously settled class action." Pet. App. at 1a-2a. Answering that question, the court concluded that those decisions "prevent applying res judicata to bar plaintiffs' claim." *Id.* at 2a.

The court of appeals first held that respondents *could* launch a collateral attack on the prior holdings that the class representation had been adequate. Notwithstanding its previous conclusion "that there was adequate representation of all class members in the original *Agent Orange* settlement," the Second Circuit stated (inaccurately, in our view) that "neither this Court nor the district court has addressed specifically the

adequacy of representation for those members of the class whose injuries manifested after depletion of the settlement funds." Pet. App. 13a. In this regard, the court distinguished its decision in *Ivy/Hartman* on the ground that the illnesses of the plaintiffs in that litigation became manifest prior to the termination of direct cash payments to class members. *Id.* at 13a-14a. "Therefore," the court held, "plaintiffs' suit can go forward because there has been no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund." *Id.* at 14a. Citing this Court's decision in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), the court of appeals concluded that "[i]f [respondents] were not proper parties to th[e] [class action] judgment * * * res judicata cannot defeat their claims." Pet. App. at 16a.

The court then turned to the merits of the collateral attack on the prior determination of adequacy, finding *Amchem* and *Ortiz* dispositive. The Second Circuit read those decisions, both of which were handed down long after the Agent Orange settlement, to hold that it generally is improper for a court to certify "a class which purports to represent both present and future claimants." Pet. App. 19a. Observing that "the prior [Agent Orange] litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994," the court of appeals accordingly took *Amchem* and *Ortiz* to indicate that respondents here "were not adequately represented in the prior *Agent Orange* litigation." *Ibid.* And because the court of appeals evidently understood *Amchem* and *Ortiz* to state a constitutional rule, it went on to opine that respondents had not been "afforded due process in the earlier litigation." *Id.* at 20a. The court therefore held that respondents "were not proper parties [to that litigation] and cannot be bound by the settlement." *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The Agent Orange class was certified nearly 20 years ago. At the time, the courts directly confronted the question whether the class was adequately represented, with the issue vigorously contested first by the defendants and then by class objectors. Two district judges and the court of appeals, keenly aware of the judicial obligation to guard against intraclass conflicts, found the representation adequate. Faced with a certified class, petitioners settled the suit, making an unallocated $180 million payment to be distributed by the district court on the express condition that class members not initiate future Agent Orange litigation.

Now, many years later, respondents have become dissatisfied with the district court's distribution plan because they fell ill at a time when it was no longer possible for them to obtain direct payments from the settlement funds. Although respondents did not opt out of the class or object to the terms of the settlement prior to payment of the judgment – and although, like all members of the class, they benefited from the activities of the class assistance foundation – respondents insist that their current inability to receive direct cash payments shows that they were not adequately represented at the time of the settlement and that, as a consequence, they should not be bound by the class judgment.

The implications of this argument are dramatic. Respondents' approach would subject petitioners to new rounds of litigation and the prospect of additional liability *after* they already have irretrievably paid a substantial settlement on the express condition that they would *not* face future lawsuits. And more generally, respondents' approach would substantially undermine the utility of the class action procedure by making it impossible *ever* to definitively determine that a class is adequately represented.

I. This outcome is worse than unfair and unwise: it is legally insupportable, for several reasons. *First*, post-judgment

developments – here, the fact that, as matters eventuated, respondents became ill after direct payments from the settlement fund had terminated – may not be used to reopen litigation. After-the-fact dissatisfaction with the outcome of a lawsuit never has been thought to justify a collateral attack on a final judgment. The court of appeals nevertheless reasoned that, at the time of class certification, veterans who would become ill after direct payments from the settlement fund ended should have been put in a separate subclass. That conclusion suffers from a fatal failure of logic; at the time of certification *all* asymptomatic class members were in precisely the same position because it was not known or knowable when, if ever, any particular veteran would become ill.

Second, and more fundamentally, barring respondents from relitigating adequacy of representation is fully consistent with the requirements of due process. The good-faith implementation of Fed. R. Civ. P. 23 – a rule that was applied by the courts in this case and that specifically requires, among other things, that the court itself assure the adequacy of class representation – suffices to "insure[] the protection of the interests of absent parties who are to be bound by [the judgment]." *Hansberry*, 311 U.S. at 42. At the same time, the balance of public and private interests that go into the due process equation shows that absent parties have not been denied due process when they are bound by determinations of adequacy made under Rule 23: (1) respondents' interest in relitigation is limited by the Rule 23 protections themselves, which assure that the settlement is fair to absent parties; (2) the risk that the initial determination of adequacy was incorrect is low, as is the value of relitigation; and (3) the interests both of adverse parties (who have a right to count on finality) and of the public (which would see the class action mechanism sapped of much of its utility if relitigation is permitted) weigh heavily against allowing collateral attacks on determinations of adequacy.

II. Even if collateral challenges to long-settled findings of adequacy are permissible, the Second Circuit committed fundamental errors in the way it went about conducting the new adequacy inquiry. The court assumed that the analysis used in resolving a collateral attack is identical to the one that governs on initial direct review of the adequacy determination. But that plainly is wrong, because the due process balance is dramatically different in a collateral proceeding. The claimant who seeks to avoid the binding force of a final judgment and thereby to upset settled reliance interests must make a far more powerful showing of prejudicial intraclass conflicts than does a class member challenging adequacy of representation in the initial litigation. In addition, any redetermination of adequacy must be made on the basis of the facts and law as they existed at the time of the original judgment. When viewed under the proper standards, there is no basis for setting aside the finding of adequacy made in the Agent Orange litigation nearly two decades ago.

ARGUMENT

I. THE PRIOR FINAL DETERMINATION THAT ALL MEMBERS OF THE AGENT ORANGE CLASS WERE ADEQUATELY REPRESENTED IN THE ORIGINAL LITIGATION IS NOT SUBJECT TO COLLATERAL ATTACK

A. Class Action Judgments Are Binding On All Members Of The Class And May Not Be Reopened On The Basis Of Developments Occurring After The Entry Of Final Judgment

1. Preclusion principles apply in class litigation. The background principles that control this litigation are not in dispute. To begin with, "[a] fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata*, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent

suit between the parties or their privies.'" *Montana* v. *United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pac. R. Co.* v. *United States*, 168 U.S. 1, 48-49 (1897) (ellipses in original)). As a consequence, "the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination" (*Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982)), and such a judicial decision "precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores* v. *Moitie*, 452 U.S. 394, 398 (1981). See, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 332-333 (1979).

This preclusion of collateral litigation "is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts." *Moitie*, 452 U.S. at 401 (citation and internal quotation marks omitted). Indeed, rules of issue and claim preclusion are "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana*, 440 U.S. at 153. The important social values those rules advance have often been rehearsed: barring collateral litigation protects parties against "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-154. See, *e.g.*, *Kremer*, 456 U.S. at 467 n.6; *Allen* v. *McCurry*, 449 U.S. 90, 94 (1981); *Parklane Hosiery*, 439 U.S. at 326. This "'public policy'" that "'there be an end of litigation'" is so fundamental that even matters going to the court's jurisdiction – and, thus, to its very authority to decide the case – once "fully and fairly litigated and finally decided" shall "'be considered forever settled between the parties.'" *Durfee* v. *Duke*, 375 U.S. 106, 111 (1963) (citations omitted). See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940).

There is no doubt that this principle of finality applies with full force in the class action context. "[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). This means that "[a] judgment in favor of either side [in a class action] is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment." *Ibid.* See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 801 (1985); *Hansberry*, 311 U.S. at 41-42. In particular, in an action under Fed. R. Civ. P. 23, "'[a]ll members of the class * * * are bound by the judgment entered in the action unless, in a Rule 23(b)(3) action, they make a timely election for exclusion.'" *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996) (citation omitted). See *Devlin* v. *Scardelletti*, 122 S. Ct. 2005, 2011 (2002) ("appealing the approval of a settlement is [a class member's] only means of protecting himself from being bound by a disposition of his rights he finds unacceptable").

On the face of it, those principles would appear to dispose of this case. Respondents concededly are members of the Agent Orange class certified by Judges Pratt and Weinstein, and therefore are bound by the class judgment. The adequacy of class representation (and, more broadly, the propriety of class certification) was contested and decided both at the time of preliminary class certification in 1980 and at the time of final certification in 1983. See pages 4-5, *supra*. Adequacy of representation was contested and resolved again when objectors sought reconsideration of the settlement. See page 9, *supra*. And it was raised, contested, and expressly resolved by the Second Circuit on appeal in *Agent Orange I*. See pages 11-12, *supra*. The issue of adequate representation therefore should be "considered forever settled between the parties."

2. Post-settlement developments may not be used to reopen class judgments. The court of appeals nevertheless held that

respondents were not bound by the class judgment. In the court's view, class members who did not manifest illness until after 1994 (the year direct cash payments from the settlement fund terminated) may not be treated as "proper parties" to the class action because "there has been no prior adequacy of representation determination" with regard to this limited subclass of veterans "whose claims arise after depletion of the settlement fund." Pet. App. 14a. Starting from that hypothesis, the court concluded that the holdings of *Amchem* and *Ortiz* permitted reexamination of the prior judgment as to adequacy. There is however, a fatal error in this conclusion.

a. The Second Circuit's essential reasoning was that respondents *must* not have been adequately represented because, as events ultimately turned out, they did not become ill until after 1994 and therefore could not recover direct cash payments from the settlement fund. But this holding runs afoul of basic preclusion principles. It has never been thought that after-the-fact dissatisfaction with the outcome of litigation justifies a collateral attack on a long-final judgment; after all, allowing such an attack "'would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avoid.'" *Moitie*, 452 U.S. at 398-399 (citation omitted). Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992) (modification of a consent decree ordinarily "should not be granted where a party relies upon events that actually were anticipated at the time it entered into [the] decree"). Indeed, the entire point of the preclusion principle described above is that parties do *not* get a second bite at the apple simply because they are unhappy about how the judgment played out over time. That is no less true of class actions than of other forms of litigation.

The court of appeals compounded this basic legal mistake with a logical error. It concluded that class members who became ill after 1994 should have been put in a subclass (or let out of the class action altogether) because they necessarily were

disadvantaged by the settlement relative to those who manifested symptoms earlier. But this reasoning is unsound. The court did *not* say that *all* asymptomatic class members had been inadequately represented, or that it was impermissible to certify a unitary class consisting of both currently ill and (some limited group of) asymptomatic veterans; to the contrary, the court accepted as correct its previous holding in *Ivy/Hartman* that class members who had not been ill at the time of settlement in 1984, but who developed symptoms between 1984 and 1994, *had* been adequately represented and therefore *were* bound by the judgment. See Pet. App. 13a-14a. Yet at the time of class certification and settlement in 1983 and 1984, it was not known – *and was not knowable* – which veterans would become ill prior to 1994, which would become ill after 1994, and which would never become ill at all. This means that, at the time of settlement in 1984, respondents were in precisely the same position as all other "future claimants" because each operated behind a "'veil of ignorance,'" not knowing "where [he or she] would end up." *Uhl* v. *Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 986 (7th Cir. 2002) (Diane Wood, J.). Thus, if it was permissible for many asymptomatic veterans to have been in the class along with the then-impaired, as the court of appeals conceded to be the case, the distinction drawn by the court simply makes no sense.

b. In addition, the court of appeals clearly was wrong in its related view that the finality of a judgment is affected by subsequent changes in the substantive law. Here, the Second Circuit believed that this Court's decisions in *Amchem* and *Ortiz* undermined the correctness of the 1980 and 1983 decisions to certify the Agent Orange class. See Pet. App. 1a-2a, 17a-20a. But even if the court of appeals were right in its reading of *Amchem* and *Ortiz* (a point that we address below), those decisions cannot provide a basis for reopening a holding that had become final many years earlier. The preclusive effects of a final judgment are not "altered by the fact that the

judgment may have been wrong or rested on a legal principle subsequently overruled in another case. * * * A judgment merely voidable because based on an erroneous view of the law is not open to collateral attack, but may be corrected only by a direct review * * * ." *Moitie*, 452 U.S. at 398.[5] When the Second Circuit posed the problem before it as "determin[ing] the effect of the Supreme Court's landmark decisions in [*Amchem* and *Ortiz*] on a previously settled class action" (Pet. App. 1a-2a), the answer therefore should have been elementary: those decisions *should have no effect at all* on cases that had gone to final judgment many years before. For that reason alone, the decision below should be set aside.

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[5] It "has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule." *Teague* v. *Lane*, 489 U.S. 288, 308 (1989) (opinion of O'Connor, J.). See *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 758 (1995) (new legal rules "do not apply to cases already closed"); *Harper* v. *Virginia Dep't of Transp.*, 509 U.S. 86, 97 (1993) (rule of law announced by the Court "must be given full retroactive effect in all cases *still open on direct review*") (emphasis added); *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.) ("retroactivity in civil cases must be limited by the need for finality; once suit is barred by res judicata or by statutes of limitations or repose, a new rule cannot reopen the door already closed"). The conclusion that changes in the law do not justify disturbing settled civil judgments also draws force from decisions holding that Fed. R. Civ. P. 60(b)(6) generally does not allow final judgments to be revisited on the basis of subsequent decisions that state new rules, even when the interests at stake are very substantial. See *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950). See also, *e.g.*, *Travelers Indem. Co.* v. *Sarkisian*, 794 F.2d 754, 757 (2nd Cir. 1986); *United States* v. *Woods*, 986 F.2d 669, 681 (3rd Cir. 1993); *Blue Diamond Coal Co.* v. *Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir.), cert. denied, 122 S. Ct. 643 (2001).

B. Barring Respondents From Relitigating Adequacy Of Representation Is Fully Consistent With Due Process: The District Court Long Ago Afforded Respondents The Necessary Process By Conducting The Analysis Required By Rule 23

The court of appeals' principal focus was on the distinction between class members who manifested illness after 1994 and those who became ill earlier. But the court below may have meant to hold more broadly – as respondents appear to argue – that absent class members *always* may collaterally attack the adequacy of representation by asserting that they *had not been adequately represented when the original adequacy determination was made*. The implication of this extraordinary argument is that it is never possible to settle definitively that a class is adequately represented because ranks of absent class members may come forward one after another to argue that the persons who litigated adequacy the last time did not adequately represent *them*. On this view, a finding of adequacy is essentially advisory as to absent parties and may be continually challenged on due process grounds by disgruntled class members. This is by no means a theoretical prospect, as this case shows; it will almost always be possible for class members to claim that they were differently situated from others in the class in some way that, in hindsight, could appear significant.[6]

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[6] Here, for example, the distinction between those who became ill pre- and post-1994 – which is the focus of respondents' argument – is by no means the only, or even the most obvious or significant, distinction between class members drawn by Chief Judge Weinstein's allocation formula. Others include the distinction between veterans who are completely disabled (who were eligible for settlement funds) and those who were ill but not disabled (who were not), as well as myriad related eligibility distinctions the judge imposed. Under respondents' theory, all of those distinctions could form the basis for an adequacy challenge.

But this approach, too, is misguided. The determination that a case may proceed as a class action, if made in accordance with Fed. R. Civ. P. 23, binds all members of the defined class. Of course, any judgment may be attacked if enforcing it would violate due process. But "this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted[] fairly insures the protection of the interests of absent parties who are to be bound by [the judgment]." *Hansberry*, 311 U.S. at 42. And here, implementation of Rule 23's procedures (of which Rule 23(a)(4) is a crucial component) provided respondents with all the process due by "fairly insur[ing] the protection of the interests of absent parties" so far as the determination of adequacy is concerned.

1. Good-faith application of Rule 23 in a class action ordinarily ensures that binding absent class members to the judgment – and to the determination of adequacy that is a necessary part of that certification – comports with the Due Process Clause. It is, to be sure, a fundamental tenet of due process that a party may not be bound by a judgment in a representative suit if he or she was not "adequately represented" in the proceedings leading to that judgment. *Richards* v. *Jefferson County*, 517 U.S. 793, 794 (1996). See, *e.g.*, *Shutts*, 472 U.S. at 812; *Hansberry*, 311 U.S. at 41-42. But having stated that principle, it remains necessary to determine what constitutes "adequacy" in a given context and to identify the considerations that make it fundamentally fair, and thus permissible, to bind an absent party. The Court's decisions provide the answer to that inquiry: an absent party may be bound when the procedures in place provide a reasonable (or "adequate") degree of assurance that his or her interests were taken into account by the decision-maker in the original litigation. That does not mean that the absent party necessarily must have received actual notice of the proceedings, or that the party must actually have appeared and been heard by the court in person, or that the party's views must have been

presented in just the same way that they would have been argued had the party been able to appear in person. Instead, what *is* necessary, and what justifies binding the absent party, is a procedure that operates to protect the interests of that party in court.

a. On the specific question in this case – whether the "procedure adopted[] fairly insure[d] the protection of the interests of absent parties" regarding adequacy of representation – the good-faith implementation of the requirements of Rule 23 *did* provide the required protections, and thus accorded absent class members all the process that was due. Rule 23 was written for the precise purpose of providing the procedural safeguards that would justify both the treatment of the case as a class action and the imposition of a judgment binding on all class members. See, *e.g.*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974); cf. *Amchem*, 521 U.S. at 614-615, 621. As Professors Kahan and Silberman accordingly have explained, "[t]he whole point of the class action procedure – and what distinguishes it from permissive intervention – is its basic premise that a judgment does have binding effect on absent class members who are designated as such through the class action certification procedure of Rule 23 or its state counterparts." Kahan & Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison*, 73 N.Y.U. L. REV. 1193, 1202 (1998).

Of particular importance here, Rule 23(a)(4) mandates an inquiry designed to ensure that the interests of all class members are adequately represented and are sufficiently cohesive to justify treatment of the case as a class action. A district judge may not enter a default judgment in favor of adequacy, or presume that the class representatives are sufficient when adequacy is not disputed. Instead, Rule 23(a)(4) requires the judge "to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative" and to insist on "actual, not presumed, conformance with Rule 23(a)." *General Tel. Co. of the*

Southwest v. *Falcon*, 457 U.S. 147, 160 (1982). The leading commentators in this area therefore have observed that, even when there is "no adversarial litigation of adequacy, the court itself has an obligation to make the finding of adequate representation"; "federal class action procedures in effect appoint the court as guardian of the interests of absent class members to ensure adequate representation." Kahan & Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 264, 268. This is an "independent obligation * * * imposed on the court" (Kahan & Silberman, *The Inadequate Search for "Adequacy" in Class Actions: a Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765, 771 (1998)), which obligates the judge "to protect the interests of the unnamed class members." 7A C. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1765 (3d ed. Supp. 2000).[7]

Moreover, it must be assumed that judges will faithfully fulfill this responsibility. In a related context, the Court has indicated that, "[i]n assessing what process is due * * *, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs" (*Mathews* v. *Eldridge*, 424 U.S. 319,

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[7] See, *e.g.*, *Malchman* v. *Davis*, 706 F.2d 426, 433 (2d Cir. 1983) (district court is obligated to "make an independent evaluation of whether the named plaintiffs were adequate representatives of the class"); *Walsh* v. *Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983) ("The court was required to * * * consider whether class counsel provided fair and adequate representation to the class as a whole"); *Movement for Opportunity & Equal.* v. *General Motors Corp.*, 622 F.2d 1235, 1254 (7th Cir. 1980) (court "has a duty * * * to protect the potential members of the class" which "can only be done by assuring adequate representation of their interests"); see also *Reynolds* v. *Beneficial Nat'l Bank*, 288 F.3d 277, 279-280 (7th Cir. 2002) (Posner, J.) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class * * *.").

349 (1976)); that presumption surely is at least as true of Article III judges. Rule 23(a)(4) thus establishes the class action setting as one in which the judge necessarily *does* make a "special effort 'to protect the interests of the [absent] plaintiffs.'" *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 167 (1999) (quoting *Richards*, 517 U.S. at 802). For this reason, as former Chancellor Allen has explained, "[f]undamental fairness to class members does not require" that they be permitted to attack class judgments collaterally because "[a] class member in a Rule 23(b)(3) class action is afforded due process of law by the conscientious application by the court of the requirements of Rule 23 * * * ." Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 1149, 1160 (1998).

b. This conclusion that implementation of Rule 23's procedures *itself* ordinarily assures due process for absent class members regarding the adequacy determination draws strong support from the Court's analysis in *Shutts*. Addressing a Kansas class certification rule that was, in relevant part, identical to Fed. R. Civ. P. 23, the Court noted:

> A plaintiff class * * * cannot first be certified unless the judge, with the aid of the named plaintiffs and defendant, conducts an inquiry into the common nature of the named plaintiffs' and the absent plaintiffs' claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the absent plaintiffs' interest.

472 U.S. at 809. Given the trial court's obligation to engage in such an inquiry and to "protect [the absent class member's] interests" (*ibid.*), the Court added, "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Id.* at 810.

As Judge O'Scannlain recently explained for the Ninth Circuit, this discussion in *Shutts* plainly "implies that [collateral

attack on the determination of adequacy] is unwarranted by emphasizing that the certifying court is charged with protecting the interest of the absent class members." *Epstein* v. *MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999). "Simply put," under the *Shutts* analysis "the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal * * * and by direct review in the United States Supreme Court." *Ibid.* See Kahan & Silberman, 73 N.Y.U. L. REV. at 781-782. Thus, "*Shutts* contemplates that the initial forum should make a finding of 'adequate representation' * * *. So long as this finding is made and the procedures for making it are fair" – as Rule 23's procedures surely are – "the substance of the finding itself is not subject to collateral attack." *Id.* at 771.

That conclusion also is wholly consistent with decisions like *Hansberry*, in which the Court held that absent parties were not bound by prior judgments; in those suits, the courts were *not* subject to procedural requirements obligating the judge to ensure the propriety of the class-action mechanism or the adequacy of representation. *Hansberry* itself, the decision principally relied upon by the court below, purported to be a representative action (see 311 U.S. at 39), but *Hansberry* was litigated long before adoption of the current version of Fed. R. Civ. P. 23 and its state-court counterparts. The absent class members there received *none* of the protections accorded respondents and other unnamed class members under Rule 23: the *Hansberry* trial court was under no obligation to, and did not in fact, take any steps either to ensure the adequacy of the class representation or to provide notice to absent class members. See 311 U.S. at 38-40, 44-46. Just the opposite is true in suits proceeding under Rule 23.[8]

[8] Similarly, *Richards* and *South Central Bell* were not representative suits at all; notice was not provided to absent parties in those cases and "there is no reason to suppose that the [first] court took care to protect the interests" of the parties subsequently said to be bound by the first judgment. *Richards*, 517 U.S. at 802. See *South Cent. Bell*, 526 U.S. at 167-168.

c. Indeed, the Court has long made clear that the focus of the due process inquiry in this setting must be on the *procedures* used to ensure that the interests of absent class members are taken into account, rather than on the particulars of the prior litigation. As we have noted, *Hansberry* emphasized that courts must look to "the *procedure adopted*" to "insure[] the protection of the interests of absent parties." 311 U.S. at 42 (emphasis added). Accord *Kremer*, 456 U.S. at 481; *Montana*, 440 U.S. at 164 n.11. Again in the Ninth Circuit's words, under this analysis "[d]ue process requires that an absent class member's right to adequate representation be protected by the adoption of the *appropriate procedures* by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review." *Epstein*, 179 F.3d at 648 (emphasis added).

This focus on what the procedures in place require courts to do, rather than on the merits of the particular decision a class member subsequently seeks to attack, is central to the due process analysis. The Court has held in a variety of contexts that

> the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process *as applied to the generality of cases*, not the rare exceptions."

Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985) (quoting *Mathews*, 424 U.S. at 344) (emphasis added). "'[T]he criterion is not the possibility of conceivable injury but the just and reasonable character'" of the process

provided. *Dusenbery* v.*United States*, 122 S. Ct. 694, 701 (2002) (quoting *Mullane* v. *Cent. Hanover Bank*, 339 U.S. 306, 315 (1950)). "'Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done.'" *Mullane*, 339 U.S. at 319 (citation omitted).

2. The courts determined in accordance with Rule 23 that the Agent Orange suit was properly maintained as a class action and that class representation was adequate. a. Here, it is not disputed that the district and appellate courts *did* conscientiously apply the Rule 23 procedures. Judges Pratt and Weinstein engaged in the analysis mandated by Rule 23(a)(4), fully aware of their independent obligation to guard against intraclass conflicts and guarantee adequate class representation. In so doing, the courts were, as Chief Judge Weinstein noted, "fully cognizant of the conflict arguments now hypothesized by" respondents and took those arguments into account when the determination of adequacy was made. *Ryan*, 781 F. Supp. at 919. In addition, Chief Judge Weinstein further implemented Rule 23 by requiring provision of the "best reasonable and practicable notice" available, by affording class members an opportunity to opt out of the litigation, and by assuring that the settlement was fair. See pages 6-9, *supra*. The adequacy of class representation and notice was then upheld on appeal by a court that itself closely analyzed and sought to implement the controlling Rule 23 standards. See pages 11-12, *supra*. Given the unquestioned fairness of Rule 23's procedures, those decisions may not be second-guessed now.

b. Moreover, the case for preclusion is especially strong here because the issue now pressed by respondents was "'actually litigated and adjudged'" after it was raised by persons who were situated identically to, and who had exactly the same interests as, respondents. *Montana*, 440 U.S. at 157

(citation omitted).[9] After the settlement was approved but when direct review was still available, dissatisfied class members argued before Chief Judge Weinstein that the named plaintiffs and their lawyers did not adequately represent unnamed class members whose symptoms were not yet manifest. He rejected that argument. See page 9, *supra*. Objectors then advanced the same argument (as well as the argument that class notice was inadequate) on direct appeal from the settlement and were rebuffed by the Second Circuit. See pages 11-12, *supra*. See generally *First Alabama Bank of Montgomery, N.A.* v. *Parsons Steel, Inc.*, 825 F.2d 1475, 1486 (11th Cir. 1987) ("the preclusive effect of a judgment is determined by the decision of the appellate court") (citing 1B J. MOORE, MOORE'S FEDERAL PRACTICE § 0.416[2], at 518-19 (2d ed. 1984)).

In these circumstances, the interests of respondents were "protected, in significant measure," by objectors who "advanced objections shared by the large class of similarly situated persons." *Dusenbery*, 122 S. Ct. at 705 (Ginsburg, J., dissenting). See *Mullane*, 339 U.S. at 319 (notice received by some class members "is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all"). And we can be confident that the courts entertaining the original Agent Orange litigation not only were obligated by Rule 23(a)(4) to consider the significance of potential conflicts between ill and asymptomatic class members, but *did in fact*

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[9] Of course, for reasons we have addressed (at 27, *supra*), it would have been impossible for contemporaneous objectors to argue (as do respondents now) that they were members of a subclass that would not become ill until after 1994. Objectors did expressly contend, however, that class representation must have been inadequate because "there was a sacrificing of the claims of those class members whose symptoms have not appeared: those whose injuries manifest after 10 years receive nothing no matter how horrendous their future suffering may be." *In re "Agent Orange" Prod. Liab. Litig.*, No. 84-6273 (2d Cir.), Master Br. of Appellants 54.

take into account and reject the possibility of such conflicts. Because it is thus clear that the procedural protections put in place for the benefit of absent class members came into play, there is no basis for allowing relitigation of class certification.

C. The Balance of Public And Private Interests Further Demonstrates That Respondents' Collateral Attack On Adequacy Should Not Be Allowed

For the reasons we have explained, good faith compliance with the Rule 23 procedures, even viewed in isolation, must be understood fairly and reasonably – and thus permissibly – to safeguard the interests of absent class members regarding the determination of adequacy. But the case for preclusion here is stronger than that. As the Court has indicated repeatedly, determining the process due in given circumstances requires achieving a "balance" of private and public interests. *Mullane*, 339 U.S. at 313-314. See also, *e.g*, *Dusenbery*, 122 S. Ct. at 701; *Walters*, 473 U.S. at 320-321; *Mathews*, 424 U.S. at 334-335. "At some point the benefit of an additional safeguard * * * in terms of increased assurance that the [governmental] action is just, may be outweighed by the cost." 424 U.S. at 348. The factors that generally go into this balance are familiar: they include the nature and significance of the private interests at stake, the risk of error and the probable value (if any) of additional safeguards, and the competing interests of the public and other affected parties. *Id.* at 334. See, *e.g.*, *Gilbert* v. *Homar*, 520 U.S. 924, 931 (1997); *Connecticut* v. *Doehr*, 501 U.S. 1, 10-11 (1991); *Walters*, 473 U.S. at 321. Here, given the specific circumstances of this case, and reviewing the full range of the relevant procedural due process considerations, there can be no doubt that binding respondents to the Agent Orange judgment conforms with due process.

1. The protected interest is limited. Respondents' interest in adequate class representation to ensure that their rights are safeguarded is important. But here, that interest is, in a significant respect, accounted for by the Rule 23 protections

themselves. Unnamed class members in Rule 23(b)(3) class actions are permitted to opt out of the class; class members who neither object to certification nor opt out have diminished grounds to assert that they were prejudiced by the way that the case was resolved.[10] In addition, when class action litigation is resolved by settlement, Rule 23(e) requires the district court to determine whether the settlement is fair to class members, reducing the likelihood that the class action judgment denied absent class members something of value.

These considerations are illustrated here. Respondents could have chosen to, but did not, opt out of the class. And the district court undertook exceptionally thorough efforts in conducting the fairness inquiry, concluding that the settlement was fair and reasonable only after holding eleven days of hearings in five cities and hearing from almost 500 witnesses. See pages 7-8, *supra*. And, it may be added, prior Agent Orange litigation demonstrates that, even if respondents prevail in their adequacy challenge, their ultimate prospect of success in subsequent litigation on the merits is very small. The private interest here therefore must be regarded as limited.

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[10] Rule 23, of course, requires that the class receive adequate notice. The Due Process Clause, however, does not require that all absent class members receive actual notice (see, *e.g.*, *Mullane*, 339 U.S. at 317-318; *Dusenbery*, 122 S. Ct. at 701; *id.* at 707 (Ginsburg, J., dissenting)), and for purposes of this proceeding the notice to the class must be regarded as constitutionally adequate. As noted above, Chief Judge Weinstein determined that the notice provided was "the best reasonable and practicable notice under the circumstances of this litigation" (100 F.R.D. at 731), a determination upheld by the court of appeals. *Agent Orange I*, 818 F.2d at 169. The court below nevertheless mused (without actually deciding) that respondents "likely received inadequate notice" under *Amchem* (Pet. App. 19a n.8), but as with respondents' attempt to relitigate the question of adequacy of representation, the final judgment that notice was adequate also is not subject to collateral attack.

2. Given existing protections, both the risk that the initial determination of adequacy was incorrect and the value of relitigating adequacy are low. At the same time, for the many reasons addressed above, Rule 23, with its specific requirement under Rule 23(a)(4) to consider adequacy of representation, substantially minimizes the risk that class representation will be inadequate, thus reducing the need for additional safeguards. By the time a collateral attack is launched, class representation already has been found adequate in an initial round of litigation by district and appellate courts that employed procedures the "fairness and reliability" of which there is no basis to doubt. *Mathews*, 424 U.S. at 343. Nor, absent extraordinary circumstances like collusion (which is not even alleged here), is there any reason to believe that allowing *re*litigation of the issue would add much value in protecting against error; after all, "there is no *a priori* reason to believe that the determination of (a lack of) adequate representation in a collateral attack is more likely to be correct than the determination of (the presence of) adequate representation in the initial action." Kahan & Silberman, 73 N.Y.U. L. REV. at 779.

Again, the force of these general considerations is made manifest by the record here. The district court and the Second Circuit expressly recognized their obligation to insure that class representation was adequate and free from conflicts. That determination was confirmed by the *Ivy/Hartman* litigation. And the only new consideration relied upon by the court below – the fact that respondents ultimately became ill after 1994 – improperly takes into account facts ascertainable only by hindsight that should be irrelevant to the adequacy of representation originally received by class members. There accordingly is no basis on which to conclude that additional safeguards are necessary for persons in respondents' position.

Moreover, the court of appeals' decision ignores the fact that *all* class members, including respondents, benefited from the settlement. *All* veterans, impaired and asymptomatic, received meaningful and continuing benefits through the work

of the class assistance foundation. *Every* veteran who was asymptomatic in 1984 also received something else of value – a kind of "term insurance policy" that would pay the veteran direct benefits (of the sort received by those veterans who received immediate payments) if he or she subsequently satisfied the eligibility criteria established by Chief Judge Weinstein. *All* unimpaired veterans received precisely the same "insurance policy" and, so far as was then known, all stood precisely the same chance of collecting on it.

3. Most significantly, the interests both of adverse parties and of society weigh heavily against allowing collateral attack on determinations of adequacy. a. On the other side of the balance, defendants like petitioners in this case have compelling interests in the finality of class action judgments that are themselves entitled to protection under the Due Process Clause. See *Peters* v. *National R.R. Passenger Corp.*, 966 F.2d 1483, 1487 (D.C. Cir. 1992); see generally RESTATEMENT (SECOND) OF JUDGMENTS § 74 cmt. c, f (1982). In this case, for example, petitioners vigorously contested the propriety of class certification – by, among other things, challenging the adequacy of the class representatives – throughout the lengthy district court litigation. See pages 4-5, *supra*. After the court nevertheless held the class representatives adequate and certified the class over petitioners' objection, petitioners settled the class claims on the express condition that all absent class members (including the then-asymptomatic) would be bound. When the judgment became final, petitioners paid the class almost $200 million. All class members, including respondents, have benefited at least indirectly from those payments. Needless to say, in such a setting defendants have "a distinct and personal interest in seeing the entire plaintiff class bound by *res judicata* just as [the defendants are] bound." *Shutts*, 472 U.S. at 805.

These facts, which are not unusual for class litigation, illustrate what Judge Posner described for the Seventh Circuit as "[t]he practical wisdom" of the rule against collateral

litigation. *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1019 (7th Cir. 1998). After all, as Judge Posner asked (rhetorically), when defendants have paid a huge sum to the class and certification is then belatedly challenged, "[a]re they [then] to go around to all [the] class members whom they have paid and ask for their [money] back so that th[e] litigation can return to its starting point?" *Ibid.* The genie, of course, cannot be put back in the bottle. It therefore is manifest that, when the question of adequacy has been litigated in good faith and decided against them, defendants would be placed in an impossible bind if they could not rely on the finality of an apparently definitive judgment. And when defendants have paid the plaintiff class in reliance on the judicial determination, it would be fundamentally unfair to apply "[a] rule that allows the defendant's settled expectation in the finality of litigation to be disturbed." *Peters*, 966 F.2d at 1487.

b. A related consideration also militates powerfully against collateral litigation here: the public and societal costs of allowing repeated challenges to the determination of adequacy would be immense. As noted above, the preclusion rules that respondents seek to circumvent generally "serve[] vital public interests." *Moitie*, 452 U.S. at 401. As a consequence, the decision below runs headlong into the understanding that "'[p]ublic policy dictates that there be an end of litigation.'" *Ibid.* (citation omitted).[11]

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[11] This conclusion draws considerable support from Fed. R. Civ. P. 60(b), which specifically identifies the circumstances in which it is permissible to reopen final civil judgments. In most situations, that rule imposes a one-year limit on moving to challenge a judgment, even where the basis for the challenge is "fraud of an adverse party." Fed. R. Civ. P. 60(b)(3). The courts have applied these limits strictly, explaining that collateral attack, "especially in civil cases, is disfavored because of the social interest in expedition and finality in litigation." *Bell* v. *Eastman Kodak Co.*, 214 F.3d 798, 800-801 (7th Cir. 2000) (Posner, J.). See *Ackermann*, 340 U.S. at 211-212; 11 C. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2857, at 260

Rule 23 itself makes clear that this policy takes on a compelling character in the class action context. As the Court has recognized, "'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'" *Falcon*, 457 U.S. at 155 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979)). But the approach advanced by respondents would eliminate those efficiencies and substantially undermine the utility of the class action procedure. That approach would make the courts' determination of adequate representation essentially advisory, so far as absent class members are concerned; although the defendant would be bound by a finding that the class representatives were adequate, dissatisfied class members always would be able to come forward, insist that they had not been adequately represented at the time of certification, and relitigate the question whether the class should have been certified.

The pernicious consequences of such a rule are obvious. It would "create the potential for multiple and wasteful litigation on the issue of 'adequacy of representation,' and [would] result in a new kind of forum shopping in the class action context." Kahan & Silberman, 73 N.Y.U. L. REV. at 766. Such "multiple determinations of the same issue [would] undermine the very efficiencies sought to be achieved by the class action mechanism." *Id.* at 779. And the threat of such litigation, with the attendant possibility of a court permitting a new civil action (as the Second Circuit now has), would make it significantly more difficult for parties to settle class action lawsuits; defendants would face the prospect of resolving the case and paying out on the judgment, only to confront never-ending

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(2d ed. 1995) (courts "have administered Rule 60(b) with a scrupulous regard for the aims of finality"). Rule 60(b)(6), the Rule's catch-all provision, is reserved for cases involving "extraordinary circumstances" *other* than those identified in the preceding clauses of the Rule. *Id.* § 2864, at 365. See *id.* at 368 (citing cases).

litigation brought by innumerable class members many years later. See *Peters*, 966 F.2d at 1487; Kahan & Silberman, 73 N.Y.U. L. REV. at 779; cf. *Rufo*, 502 U.S. at 389 (changing consent decrees retroactively would "serve as a disincentive to negotiation of settlements"). As former Chancellor Allen put it:

> If every member of the class who does not actually appear in a class suit prior to judgment is able to trigger a review of the quality of the efforts of those representing the class, we shall have, insofar as class actions are concerned, reinvented the problem of inefficiency and second guessing that is solved by the rule of finality and recognition of judgments. Why should the law compel that result?

Allen, 73 N.Y.U. L. REV. at 1159-1160.

Against this background, "[i]t would take an extraordinary showing of probability of error under the present system – and the probability that [permitting relitigation of adequacy] would sharply diminish that possibility – to warrant a holding that [binding respondents to the judgment] denies claimants due process of law." *Walters*, 473 U.S. at 326. Given the considerable procedural protections already afforded members of the Agent Orange class, respondents cannot make this extraordinary showing. Indeed, the substantial costs that relitigation of adequacy would impose on petitioners and the public alike make it certain that "'the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.'" *Moitie*, 452 U.S. at 402 (citation omitted). See *Shutts*, 472 U.S. at 814 (due process does not require sacrificing "obvious advantages in judicial efficiency * * * for the protection of the *rara avis*"). Given the "vital interest of the State" in bringing litigated issues "to a final settlement," "[a] construction of the due process clause which would place impossible or impractical obstacles in the way could not be justified." *Mullane*, 339 U.S. at 313-314.

* * * *

It is common ground between the parties in this case that "adequate representation" is essential to the fairness of the class action mechanism. Here, however, respondents' interests *were* fully and adequately protected by implementation of the procedural guarantees of Rule 23, including specifically the adequacy requirement of Rule 23(a)(4). In ignoring those safeguards and demanding an entire new round of litigation so that they may revisit a question that was settled long ago, respondents blind themselves to the principle "'that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection.'" *Walters*, 473 U.S. at 321 n.9 (quoting Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1276 (1975)). That point has been reached in this case.

II. IF ADEQUACY OF REPRESENTATION MAY BE REEXAMINED AFTER FINAL JUDGMENT, THE INQUIRY MUST MAKE USE OF STANDARDS THAT TAKE ACCOUNT OF THE COLLATERAL NATURE OF THE NEW REVIEW

For the reasons set out above, a collateral attack of any kind on the long-settled adequacy determination made by the courts in *Agent Orange I* is impermissible. But even if respondents *were* permitted to seek a redetermination of the adequacy of class representation, the Second Circuit nevertheless committed fundamental errors in the way it conducted that inquiry. The court wholly failed to recognize that the collateral nature of respondents' attack has a bearing on the applicable due process analysis. And the court compounded its error when, instead of basing its decision on the facts and law as they existed at the time of the original judgment, it took into account factual and legal developments that long post-dated class certification and settlement. For these reasons as well, the decision below should be reversed.

A. Respondents' Attacks On The Determination Of Adequacy Do Not Satisfy The Standards That Apply On Collateral Review

1. The collateral nature of the review affects the due process inquiry. Any collateral attack on the adequacy of class representation, if permissible at all, must be addressed to the question whether it would deny absent class members due process *now* to bind them to the prior determination of adequacy. See, *e.g.*, *Shutts*, 472 U.S. at 811-812; *Kremer*, 456 U.S. at 482; *Hansberry*, 311 U.S. at 37. Under the Second Circuit's approach, however, any showing that the class representation should have been held constitutionally inadequate on *direct review* also suffices to have the judgment as to adequacy set aside on a *collateral attack*. That approach is incorrect. Prior to final judgment, the due process question is whether the interests of the class representatives are closely enough aligned with those of the absent parties for it to be fair for the former to speak for the latter; after judgment, the quite different question is whether due process requires the reopening of long-closed litigation.

Here, respondents brought their due process challenge more than ten years after the original Agent Orange judgment became final, after the adequacy of representation had been definitively resolved (twice, as it happens) by the district and appellate courts, and after petitioners had entered into a settlement and irretrievably paid the judgment in reliance on those seemingly closed judicial determinations. These changes in "time, place and circumstances" must weigh heavily in the due process balance. *Mathews*, 424 U.S. at 334 (internal quotation marks and citation omitted). Indeed, the Court has made just that point in the closely analogous context of a collateral due process attack on a criminal conviction that advances a claim of "actual innocence": "because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality * * * and the enormous burden that having to retry such cases based on often stale

evidence often would place on the States, the threshold showing [to obtain relief on this ground] would necessarily be extraordinarily high" – far higher than the showing necessary to obtain relief by asserting "actual innocence" on direct review. *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993). Cf. *Factor VIII or IX Concentrate Blood Prod. Litig.*, 159 F.3d at 1019 (emphasis added) (noting that "[t]he principle that jurisdictional defects may be noticed at any time is limited * * * by the equally important principle that litigation must have an end," so that "[a]fter a case has become final by exhaustion of all appellate remedies, only an *egregious* want of jurisdiction will allow the judgment to be undone").

The same conclusion – that the claimant must make a different and more powerful showing to establish a due process violation in collateral civil proceedings – is compelled by the factors customarily considered when striking the due process balance. *First*, for reasons suggested above (at 35, *supra*), respondents' interest in complaining about the adequacy of class representation is limited by the Rule 23 procedures. *Second*, the risk of error is diminished in collateral proceedings because full appellate review already has confirmed that class representation was adequate. *Third*, and perhaps most significantly, *petitioners'* interest in the finality of the Agent Orange settlement, and the more general public interest in the finality of judgments, does not come into play at all on direct appeal but is of overwhelming importance at the time of collateral review. See pages 37-39, *supra*. For all of these reasons, a class member who seeks to establish a due process "adequacy" violation in collateral proceedings must clear a far higher bar than does an objector who advances a similar complaint during the course of the original litigation.

2. Respondents have not demonstrated the actual, prejudicial intraclass conflict necessary to undo a final judgment on adequacy. Given these considerations, a due process adequacy challenge may succeed in collateral proceedings only if, at a minimum, class members are able to

demonstrate both that the conflict caused them *actual* prejudice and that contravening reliance interests in the judgment on the part of other affected parties are minimal. That was the situation in *Hansberry*, the only case in which the Court found a due process violation on such a collateral attack. *Hansberry* differed from this case in several material respects that are instructive here.

In the first place, as we have explained above, the initial proceeding in *Hansberry* – which was brought to establish the effectiveness of a racially restrictive covenant on property – made *no* effort to protect the interests of the absent class members. See pages 30-31, *supra*. At the same time, the conflict between the class representative and the absent class members was patent and egregious. Their interests were as directly adverse as those of plaintiff and defendant: the class representative wanted to enforce the restrictive covenant and the absent class members did not. See 311 U.S. at 38-40, 44-45. In seeking to bind the class members in the second litigation, those claiming preclusive effect for the first judgment thus effectively argued that "all those who are free alternatively *to assert rights or to challenge them* are of a single class" and that any member of the class "may be deemed adequately to represent any others of the class in litigating their interests *in either alternative*." *Id.* at 45 (emphasis added). Given this peculiar posture, the Court found that the interests of the class representative were "not necessarily or even probably the same" as those of the absent class members. *Ibid.* Other factors also militated against giving the first judgment preclusive effect: there was every indication that the first suit had been collusively resolved, meaning that the reliance interests in the initial judgment (if there were any at all) were weak. *Id.* at 46 ("it does not appear that [the first defendants'] interest in defeating the contract outweighed their interest in establishing its validity").

There was nothing remotely similar here. We have outlined the elaborate protections that Rule 23 guaranteed the absent

class members. Objectors whose interests were the same as those of respondents came forward to litigate the issues that respondents now press. If there was an internal class conflict here at all, it was wholly theoretical. Certainly, at the time of the settlement all asymptomatic class members had an identical interest. *No* class members were directly adverse to one another, as they were in *Hansberry*; all members of the Agent Orange class, the presently ill and the unimpaired, had an identical interest in establishing petitioners' liability and in maximizing the aggregate class recovery. And petitioners' reliance interest in the judgment is manifest. In these circumstances, respondents have not made out the kind of showing necessary to establish that binding them to the class judgment would be so fundamentally unfair as to justify undoing a final judgment.

Indeed, the particular division of settlement proceeds that the Second Circuit identified as the source of the internal class conflict was devised *after the settlement by the district judge*, who indicated repeatedly and at all times throughout the litigation that he was looking out for the interests of all class members. See pages 9-10, *supra*. The court below nevertheless premised its holding on the belief that respondents had been unfairly disadvantaged by the distribution formula. But even if that is so, the error cannot be laid at petitioners' feet. Petitioners negotiated a lump sum settlement that inured to the benefit of the entire class – and they negotiated that settlement with class representatives whose interest at the time, held in common with all class members, lay in obtaining the largest possible payment to the class. The settlement distribution formula that the court of appeals found problematic was subsequently devised by the special master and Chief Judge Weinstein without *any* involvement by petitioners. See pages 9-10, *supra*. And the practical reality that the passage of time now makes it impossible for respondents to obtain a redistribution of the settlement proceeds does not justify

reopening the prior phase of the litigation involving petitioners in which respondents *were* adequately represented.

B. If Adequacy Of Representation May Be Reexamined On Collateral Review, The Determination Must Be Made As Of The Time Of The Original Class Certification

The Second Circuit committed an additional, fundamental error in applying the due process standard. The question on collateral review logically must be whether the certification decision was correct in light of the law and facts *as they existed at the time of the original litigation*: courts "do not, of course, judge the propriety of class certification by hindsight." *Falcon*, 457 U.S. at 160. See *Uhl*, 309 F.3d at 985 (rejecting argument that the class should be viewed "from an *ex post* perspective"). Here, the court of appeals departed from that principle by engaging in a hindsight review; the analysis below avowedly took account of post-settlement changes in the legal and factual landscape, including significant intervening changes in the law.

The court reasoned erroneously that respondents *must* not have been adequately represented because, as matters ultimately worked out, they became ill after 1994 and therefore did not obtain direct payments from the settlement fund. As has been noted, however, *at the time of certification and settlement* all asymptomatic class members were in precisely the same position. It is only by using an after-the-fact review that it is possible to say that particular class members were (in a relative sense) disadvantaged by the settlement formula. Yet representation that was adequate at the time cannot later be rendered inadequate simply because, as events transpire, some class members obtain greater relief than others.

In addition, the court indicated that it set out to determine the effect on the settlement of *Amchem* and *Ortiz* (see Pet. App. 1a-2a) – decisions handed down a decade after the judgment became final – and the court relied exclusively on those decisions in holding that the class representation had been

inadequate. See *id.* at 19a, 20a. The Second Circuit did so even though it recognized (correctly) that the analysis of adequacy in those holdings marked a significant departure from prior class action law. The court of appeals thus characterized *Amchem* and *Ortiz* as "landmark" decisions (*id.* at 1a), and emphasized this Court's observation in *Ortiz* that "'it is obvious *after Amchem* that a class divided between holders of present and future claims * * * requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.'" *Id.* at 18a (quoting *Ortiz*, 527 U.S. at 856 (emphasis added)). See also *id.* at 19a & n. 9. There accordingly can be little doubt that the treatment of adequacy in *Amchem* and *Ortiz* established a "new rule" in the sense that "the result was neither dictated nor compelled by precedent existing at the time" of the decisions (*Goeke* v. *Branch*, 514 U.S. 115, 120 (1995) (per curiam) (internal quotation marks and citation omitted)), and that the court of appeals invoked that new rule in deciding this case.

Applying a new rule on collateral review, however, was clear error.[12] The Court has noted that "[n]ew legal principles,

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[12] The court below also was wrong on its own terms in concluding that the determination of adequacy in this litigation cannot be squared with the principles applied in *Amchem* and *Ortiz*. To be sure, *Ortiz* stated that it was "obvious after *Amchem*" that a class including present and future claims "requires division into" subclasses with separate counsel to eliminate conflicting interests. 527 U.S. at 856. But that conclusion was specific to the facts of *Amchem* and *Ortiz*. Among other material differences between those cases and this litigation, in *Amchem* and *Ortiz* the critical source of the parties' conflict was the allocation of settlement funds – an allocation that, in contrast to the one here, was worked out between the defendants and the class representatives – in which the goal of "generous immediate payments" to the currently ill class members was in tension with the goal of "ensuring an ample, inflation-protected fund" for the future claimants. *Amchem*, 521 U.S. at 626. Here, in contrast, the petitioners negotiated a lump-sum settlement with the class. As we have noted, the plan for the allocation of the proceeds among the

even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co.*, 514 U.S. at 758. See note 5, *supra*. And the Court's decisions involving habeas corpus make clear that is so even where the law provides a mechanism for collateral attacks on final judgments (as the Second Circuit believed to be the case here). As a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310 (opinion of O'Connor, J.). See, *e.g.*, *Goeke*, 514 U.S. at 120; *Graham* v. *Collins*, 506 U.S. 461, 466-467 (1993); *Butler* v. *McKellar*, 494 U.S. 407, 412-413 (1990).

The same approach plainly is warranted in this setting: the Court has recognized the "significant and compelling parallels" between the application of finality principles in the civil and criminal contexts. 489 U.S. at 309. Indeed, finality concerns "'should not have *as much* place in criminal as in civil litigation'" (*ibid.* (citation omitted) (emphasis in original)); it therefore "would be topsy-turvy, both historically and prudentially, to permit a change of law to upset a civil money judgment more readily than a criminal judgment, which affects liberty." *Norgaard* v. *DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1077 (7th Cir. 1997) (Easterbrook, J.). And that is especially so in the class action context because giving some class members the benefit of subsequent decisions that were not applied to others itself creates an unfair inequity *within* the class. Thus, because *Amchem* and *Ortiz* "heralded a new era of judicial scrutiny of class action certification and settlement" (*Epstein*, 179 F.3d at 651 (Thomas, J., dissenting)), the standards they set out may not be applied in respondents'

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class members was developed by the special master and adopted by the court, not negotiated by the parties. There accordingly is no sense in which the interests of asymptomatic class members were bargained away to increase the settlement value for those already ill.

current collateral attack on a decision that was closed a decade ago.[13]

In addition, as we have noted, a collateral attack could be permissible (if at all) only if binding the absent parties to the prior judgment would deny them due process. *Amchem* and *Ortiz*, however – which arose on direct review and said nothing about how their rule would apply in a collateral attack – did not purport to state due process rules; in relevant part, they expressly went off on the prophylactic provisions of Rule 23(a)(4).[14] Accordingly, respondents may not rely on *Amchem*

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[13] As the habeas cases suggest, it is the burden of respondents – who seek to show that the adequacy determination should have come out differently at the time of the original judgment – to establish that "existing precedent" would have "'compelled'" the outcome they advocate. *Goeke*, 514 U.S. at 120. See, *e.g.*, *Graham*, 506 U.S. at 467. But neither respondents nor the court below made any attempt to establish that "reasonable jurists" in 1983 "'would have felt compelled by existing precedent' to rule in [respondents'] favor." *Ibid.* (quoting *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990)).

[14] See *Ortiz*, 527 U.S. at 830 (explaining that "[t]he nub of this case is the certification of the class under Rule 23(b)(1)(B)," and holding that conditions for certifying such a mandatory settlement class under that rule were not met); *Amchem*, 521 U.S. at 597 (noting that "this case concerns the legitimacy *under Rule 23* * * * of a class-action certification" and holding that requirements for class certification under the rule were not met) (emphasis added); *id.* at 629 ("Rule 23 * * * cannot carry the large load * * * heaped upon it"). In both cases, the Court explained at the outset that it did not have to address threshold justiciability questions because resolution of the Rule 23 certification issues are "logically antecedent to Article III concerns" and "themselves pertain to *statutory* standing." *Ortiz*, 527 U.S. at 831 (emphasis added) (internal citations and quotation marks omitted); *Amchem*, 521 U.S. at 612 (same). Moreover, the Court concluded in *Ortiz* that its "limiting construction" of Rule 23 was justified in part because it *avoided* the necessity of deciding constitutional questions. 527 U.S. at 842-847.

and *Ortiz* to make out the due process violation they must show to avoid being bound by the class settlement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON, EMILY ELIZABETH STEPHENSON, JOE ISAACSON, and PHYLLIS LISA ISAACSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

Respondents Joe Isaacson and Daniel Stephenson served in Vietnam, where they were exposed to "Agent Orange."[1] Isaacson volunteered for the Air Force, serving as a crewman at one of the airfields that supported Operation Ranch Hand, the code name for the "Agent Orange" missions. (JA at 291.)[2] Stephenson, a helicopter pilot, was exposed to "Agent Orange" both at his base and in-country on the ground. (JA at 254.) In 1996 Isaacson was diagnosed with non-Hodgkin's lymphoma and in 1998 Stephenson was diagnosed with multiple myeloma. Both diseases are rare, deadly cancers which have been related to "Agent Orange" exposure. (JA at 319-325.)

Respondents filed timely state law claims against Petitioners, who manufactured the chemicals which caused their cancers. Petitioners moved to dismiss these claims on the basis of *res judicata*, asserting that they had been settled years before Respondents' cancers were diagnosed. They assert this settlement as a complete bar, even though it entitled Respondents to no compensation at its inception, no eligibility for compensation while it was being administered, and no potential for compensation after Respondents were diagnosed with their cancers.

After the war ended, Respondents were fortunate to return to civilian life in good health. Although some other Vietnam veterans claimed injuries related to their exposure to Agent Orange, neither Stephenson, who became a civilian helicopter

1. "Agent Orange" is generally used to describe a variety of phenoxy herbicides used in Vietnam. Many of these were contaminated with the known human carcinogen, 2,3,7,8-TCDD (dioxin).

2. The Joint Appendix will be referred to as "JA," Petitioner's Petition for Writ of Certiorari will be referred to as "PFC," Respondent's "Opposition to the Petition for Certiorari" will be referred to as "ROC," Petitioner's Brief on the merits as "PB," and this Brief as "RB."

pilot, nor Isaacson, now a vice-principal, had any reason to do so. (JA at 243, 291.) In 1978, when injured veterans first brought lawsuits for those injuries they believed were due to "Agent Orange," Respondents similarly had no reason to pay attention to the MDL 381 proceedings in the U.S. District Court for the Eastern District of New York.

A. MDL 381 Class Certification, Notice and Opt-Out Period

The original Agent Orange proceedings were "preliminarily" certified as a class action by Judge Pratt in 1980. *In Re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 787 (E.D.N.Y.). This certification was not, as Petitioners' claim, "understood to include both ill and asymptomatic veterans," PB at 4, as Judge Pratt identified the class as "persons **who claim injury** from exposure to Agent Orange."[3] *Id.* at 788 (emphasis added). This provisional class had no identified representatives nor was there any analysis of the proposed

3. While those claiming injuries would necessarily come from the entire exposed population, Judge Pratt never stated that class members would include "asymptomatic" veterans or " veterans who had not manifested injury." Petitioners contend that, at the time of Judge Pratt's order, they "understood" that "asymptomatic" veterans were part of the certified class, PB at 4, but what Petitioners may have believed is irrelevant. As to Yannacone's argument, Petitioners themselves: (1) asserted that if plaintiffs believed the class included claims for "people that are not sick * * * [that is not a] claim upon which relief can be based;" (JA at 60.); and (2) took the "position that at risk claimants don't have a cause of action so they can't be in anything." (JA at 69). PB at n.1, citing JA at 70, misinterprets the text, as the "potential claimants" being discussed there were those with injuries who had not filed claims or lawsuits. Petitioners' quoted line at JA at 70 (PB at n.1) is followed by: "[P]laintiffs submit that the class include those whose **injuries** fall within particular Agent Orange profiles." (emphasis supplied). Significantly, Petitioners cannot point to anything in the Rule 23(c)(2) notice materials that would have alerted a typical reader that the class included veterans who had been exposed but were not yet sick.

qualifications of representatives. Judge Pratt merely stated that "the court ***will select*** from among the hundreds of plaintiffs representative persons * * * who will fairly and adequately protect the interest of the class." *Id.* (emphasis added).

When the class was finally certified by Judge Weinstein, he also found the "representatives" to be adequate, even though they were still unidentified,[4] (JA at 78-80.) relying on Judge Pratt's findings: "[t]he four prerequisites of Rule 23(a) as they apply to this litigation have already been carefully analyzed by the court and found to exist." *In re Agent Orange*, 100 F.R.D. 718, 721 (E.D.N.Y. 1983), citing 506 F. Supp. at 787. Judge Weinstein then defined the class as:

> [T]hose persons who were in the United States, New Zealand or Australian armed forces at any time from 1961 to 1972 **who were injured** while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides. . . . 100 F.R.D. 729 (emphasis added).

This class did not include "at risk," "asymptomatic," or "future" veterans (hereafter "future"). If it did, the class would have simply been defined as: "Those persons who were in the United States . . . armed forces at any time from 1961 to 1972 in or near Vietnam **who were exposed** to Agent Orange or . . ." In any case,

4. Judge Weinstein approved the class certification at a hearing which was held on December 12, 1983. (JA at 87). Mr. Gordon, counsel for Petitioner Diamond Shamrock, argued that Judge Pratt had indicated that a complaint with representative plaintiffs would be filed, that no such complaint was yet filed, and that there must be a representative plaintiff for each injury. Yet, none of the proposed representatives on a list first provided in the middle of that hearing had what could be called "relatively modest claims," much less "future" claims, and the court did "not know the profile of these people" in order to evaluate their suitability as class representatives. Nevertheless, the court certified the class. (JA at 79-83, 87.)

neither Respondents nor any other "future" claimant could have suspected that they were included in the "injured" class as noticed.[5]

In addition to certain mailed notices, the court ordered published and broadcast notice of class certification with an opportunity to opt-out by May 1, 1984. *See* 100 F.R.D. at 731-732.[6] This notice, sent pursuant to Rule 23(c)(2), was addressed only to a class of persons "who claim injury" from their exposure to Agent Orange. *See id.*

B. The Settlement, The Settlement Class and Fairness Hearings

Six days after the opt out deadline expired on May 7, 1984, Petitioners and class counsel reached a settlement of the class action. All of the representatives, who by that time had been designated, claimed significant present injuries resulting from "Agent Orange." (JA at 80, 127, 129.); P. Schuck, *Agent Orange on Trial* (1987) at 139-140.[7]

5. Far from understanding that *all* veterans who served in Vietnam would be part of the class, counsel for Petitioner Diamond Shamrock recognized that "half will not be a part of the class at all."(JA at 81.) Petitioners' counsel were most concerned that the notice to persons "claiming injury" was too subjective to bind absent class members to an adverse judgment. (JA at 84-85.) They would have had no such concern if the class was meant to include all veterans exposed in Vietnam.

6. This Rule 23(c)(2) notice was actually sent out on March 9, 1984, 597 F. Supp. at 756, less than two months before the opt out deadline. The dissemination of the notice ran into innumerable problems. For instance, 57,096 mailed notices were returned as undeliverable with no follow up. The myriad problems encountered in giving out the notice are described in JA at 171-182.

7. The Seventh Amended Complaint, filed on Feb. 17, 1984 (Docket entry #1864), was the active pleading at the time of the settlement, and it defined the class as those "who claim injury." Para. 25.It identified six representative plaintiff veterans, each of whom claimed "severe and permanent disabling injuries, diseases, physical disorders and disfigurement, and in some cases, death." *Id.* Para.39.

As part of the settlement, Petitioners agreed to pay $180 million dollars to the class. The new class representatives agreed not only to release "present claims" but also all claims of "future" veterans, i.e. those who had "not yet manifested injury" related to Agent Orange.[8] Class representatives agreed that no new 23(c)(2) opt out notice need be given to "future" plaintiffs, and that, instead, "the class definition would be interpreted to include service people whose injuries had not yet been manifested." P. Schuck, at 165; (JA at 88, 96.) The class representatives did not even demand that class members be informed of the terms of any distribution plan before the settlement was given final approval.

As a result, the court approved a notice pursuant to Rule 23(e) which included no right to opt out of the settlement and no information about what absent class members might recover under the settlement. The Rule 23(e) notice instructed veterans in bold letters that: "THE ONLY QUESTION TO BE DECIDED AT THIS TIME IS WHETHER THIS SETTLEMENT AS A WHOLE IS FAIR, REASONABLE AND ADEQUATE." (JA at 109.) (All caps in original).

Unlike the Rule 23(c)(2) notice mailed out after the certification, this 23(e) notice was neither broadcast nor televised. *In Re Agent Orange*, 597 F. Supp. 740, 763 (E.D.N.Y. 1984). It did not call attention to the fact that the settlement class now included "future" veterans who did not claim injuries.

8. Petitioners insisted on including "futures," as it was obviously in their interest to include as many people as possible in the lump sum settlement. Dow's counsel wanted to include civilians sent to Vietnam, Vietnamese civilians, and even children who had not yet been born into the lump sum settlement. Petitioners opposed any renewed opt out right. Petitioners also extracted an agreement which allowed them to walk away from the settlement if too many veterans had previously opted out. No veteran was afforded either a similar walk away provision or a "back-end" opt out right. P. Schuck, *Agent Orange on Trial*, 153-154 (1987); (JA at 96.)

Rather, the bold introductory header of the notice advised the reader only of: "WHAT YOU MUST DO NOW IF YOU BELIEVE YOU HAVE A CLAIM FOR ADVERSE HEALTH EFFECTS." (JA at 106.) Paragraph 1 of the notice then repeated that the court had previously certified a plaintiff class consisting of persons "who were injured while in or near Vietnam by exposure to Agent Orange" and that persons who did not opt out before May 1, 1984, were members of the class for purposes of the settlement if they fit within the above class definition. 597 F. Supp. at 867; (JA at 106-07.) Buried inside was the statement that "the settlement agreement confirmed that the class includes persons who had not yet manifested injury." (JA at 108.) The notice never specified in any way what, if anything, those individuals who had "not yet manifested injury" would receive nor even what that phrase meant.

This Rule 23(e) settlement notice did not inform absent class members that none of the class representatives fit into the subclass of veterans who had "not yet manifested injury," nor was a new class representative appointed who did. (JA at 108.) *Id.* The Court also refused to appoint separate counsel for "future" claimants, stating that this would only serve to "increase the amount of legal fees" which would be deducted from the overall cash settlement.[9] (JA at 129-130.)

While the Petitioners were aware of the conflicts created within the class, they never offered to pay for any counsel, trustee, or guardian, nor did they insist that the "future" claimants have a subclass with any type of separate representation. As a result, "future" claimants had no one protecting their interests. *See In Re Agent Orange*, 996 F.2d 1425, 1437 (2d Cir. 1993).

9. The Court also never ordered a Rule 23(d)(2) notice, which would have given "the opportunity [to] members to signify whether they consider the representation fair and adequate." The 23(e) class settlement notice never told absent class members that they could challenge the adequacy of the class representatives or the sufficiency of the notice. Moreover, the court rejected a motion to certify a subclass of objectors to the settlement. 597 F. Supp. at 757.

Judge Weinstein gave preliminary approval to the Settlement Agreement on January 7, 1985, 597 F. Supp. at 857-58, (reaffirming that decision on June 18, 1985, and issuing a final order of dismissal on July 9, 1985 in *Ryan v. Dow*, 618 F. Supp. 623, 624-25 (E.D.N.Y.). In doing so, Judge Weinstein never discussed: (1) whether presently injured class representatives and their attorneys could adequately represent "future" plaintiffs; (2) whether those representatives and their counsel had adequately represented the subclass of "future" plaintiffs when, after the opt-out period had terminated, they agreed to reinterpret a class defined as "injured" to include "persons who have not yet manifested injury;" (3) whether the notice of class certification, which defined the class as "claiming injury," provided notice to Vietnam veterans who themselves had never "claimed injury;"[10] (4) whether there was any actual or potential conflict between present and future claimants in attempting to divide the $180 million fund; or (5) whether the representative plaintiffs and their attorneys could serve as adequate representatives for "future" claimants in light of these conflicts.[11] Instead, Judge

10. Petitioners have included in the JA written objections from one plaintiff's attorney (who was not a class counsel). Although this attorney did raise some of the issues delineated above, the court and Petitioners noted that all of *his* clients had present injuries and had received the 23(c)(2) notice from the attorney himself (who had then advised them to opt-out of the pre-settlement class). (JA at 189-191.) Moreover, he was himself a subject of motions to disqualify, because while opposing the class settlement, he was seeking attorney's fees out of its proceeds. (JA at 183-185.) Additionally, in representing present claimants, his interest was to ensure that "future" claims did not deplete the recovery available to them for their "present" injuries. (JA at 144-145.) The court's denial of this attorney's motions, without any comment, leaves unanswered the question of whether the court reached the merits of his objections or decided that the attorney lacked the standing to raise objections for "futures" not shared by his clients.

11. The vast majority of veterans who appeared at the confirmation hearings objected to the settlement. However, the Court concluded that: "The strong opposition of a considerable number of sincere and well-

(Cont'd)

Weinstein's entire discussion of adequacy of representation was devoted to whether class counsel had adequately communicated with the class. 597 F. Supp. at 759.

C. The Distribution Order and Its Treatment of "Futures"

The distribution order, including the veteran payment program, was issued on May 28, 1985, and drew sharp distinctions between "present" and "future" claimants. (JA at 266, 272-273.) Claimants were to receive cash compensation for all **existing** disabilities, which had lasted for at least one year, as well as death, with payments retroactive to 1970. The amount of compensation singularly depended on the duration of time the disability existed. Veterans could receive payments for disabilities based upon each year they were disabled between 1970 and 1994; as such, the earlier someone got sick, the more money the veteran was eligible to receive.[12] *In re Agent Orange*, 611 F. Supp. 1396, 1419-20 (E.D.N.Y.). This provision benefitted "present" claimants.[13] (JA at 275-278; PB at 10.)

(Cont'd)
motivated members of the class cannot, under these circumstances, be decisive." 597 F. Supp. at 763.

12. The 1994 termination date was also inconsistent with the 23(e) settlement notice which had stated:

> [I]n order to assure that the Fund will not be exhausted before all potential claims for unmanifested adverse health effects are processed, it may prove necessary to adjust the compensation for presently manifested health effects so that funds are available for class members who may manifest compensable effects in the future. 597 F. Supp. at 870

13. There was no compensation allotted for veterans who became totally disabled or died before the age of 60, a limitation which also disproportionately reduced payments to " futures", as fewer Vietnam veterans would have reached the age of 60 by 1984. (JA at 275, 283.)

Although Judge Weinstein had stated during the fairness hearings that "if they have a manifestation in the future, they are entitled to some compensation," (JA at 129), the plan called for persons who became disabled on or after January 1, 1995 to receive nothing. 611 F. Supp at 1417. Finally, the plan included the provision of a $10 million indemnity fund which was to be kept in reserve until May 7, 2008 to reimburse Petitioners in the event of judgments in state court actions. *See id.* at 1437.

No effort was made to tie compensation to any future injuries that the scientific literature might find to be caused by Agent Orange, even though, as of 1984, phenoxy herbicide exposure was a suspected cause of a group of illnesses, including non-Hodgkin's lymphoma. (JA at 137-144 and Affidavit of Laura Welch, JA 294-299) Furthermore, the existence of a latency period of well in excess of twenty years between the time of exposure and the manifestation of cancer was well known. The district court recognized that it was "of course, possible that in a few years a sudden increase in diseases associated with Agent Orange will be revealed," 597 F. Supp. at 795, noting that "[i]t took almost forty years for solid tissue cancers to develop in victims of atomic bombing in Japan." *Id.* Yet, at the time of the settlement, the earliest exposed veterans were only 22 years post-exposure, while the most recently exposed veterans were a mere 13 years post-exposure. *Id.* at 783. (JA at 294-299.)

Further, the court recognized that numerous studies on these herbicides were being conducted, but had not been concluded: "Courts cannot, unfortunately, wait indefinitely until all scientists have completed their long term studies. They must decide on the information now available." 597 F. Supp. at 782. Realizing this potential, the court never explained why "futures" with unaccrued claims couldn't wait until these studies were completed but rather needed to settle while their claims were immature.

The plan's failure to provide a mechanism to adjust the compensation for "future" claimants in light of evolving science was inconsistent with the Court's 23(e) class settlement notice. This had promised that: "The designated kinds of adverse health effects entitled to compensation under the Fund may be modified periodically, based upon various scientific studies, some of which are now in progress." 597 F. Supp. at 870.

The court's distribution order was neither noticed by publication nor broadcast to the class. Instead, the court used a network of veterans' organizations to get the word out, as well as sending first class mailed notice to veterans who had already filed claims. *See* 611 F. Supp. at 1445-46. Neither Stephenson nor Isaacson was a member of any of these veterans' organizations at the time. (JA at 291.)

D. Rulings of the Second Circuit

In affirming the class judgment, the Court of Appeals acknowledged the diversity of interest among those with "strong claims" and those with "weak claims" but concluded that the "use of the class action was appropriate, although many potential difficulties were avoided only because all plaintiffs had very weak cases on causation." *In re Agent Orange*, 818 F.2d 145, 165-66 (2d Cir. 1987). Although Petitioners argue the concept of fairness to the class as a whole and the reasons class representatives and "present" claimants might have wanted to settle "for nuisance" value, (PB at 12, citing 818 F.2d at 171),[14]

14. The other basis cited by Petitioners for the "weakness" of the case is the strength of their government contractor defense. (PB at 3). However, Judge Pratt denied Petitioners' summary judgment motion on the defense, 506 F. Supp. at 795-96, so there was no ruling as to this fact-laden issue binding the class. While Judge Weinstein granted summary judgment as to individual plaintiffs, after this Court's decision *in Boyle v. United Technologies Corp.*, 487 US 500 (1988) Judge Weinstein reevaluated his position and ruled that government control over Agent Orange production was insufficient to warrant removal under 28 U.S.C. § 1442(1). *Ryan v. Dow Chemical Co.* 781 F. Supp. 934, 951 (E.D.N.Y. 1992).

neither the Second Circuit nor Petitioners ever explain why "future" claimants would want to settle their unripe claims for "nuisance value" (or nothing) when they, unlike "present" claimants, could wait for the completion of studies being done.

The Second Circuit also addressed the issue of adequacy of representation when it struck down a fee-sharing agreement, first disclosed four months after the settlement, which gave "investor" firms who advanced $200,000 in litigation expenses a $600,000 return after only five months. The court observed that: "[A]s soon as an offer of settlement to cover the promised return on investment is made, the investor attorney will be disinclined to undertake the risks associated with continuing with the litigation." In this case, "the conflict was especially egregious," as "six of the nine" Plaintiffs' Management Committee members were investors in the case. 818 F.2d at 224; *see also* JA at 152-153.

The Second Circuit never addressed the question of whether presently injured claimants could represent future claimants or whether anyone could adequately represent future claimants whose disabilities would accrue after the fund expired in 1994.[15] *See, e.g.*, 818 F.2d at 167.

The distribution scheme was remanded to Judge Weinstein, who modified it to comply with the Second Circuit's opinion[16]

15. The Second Circuit's opinion on the challenges to Judge Weinstein's distribution plan does not refer to any objection that the distribution plan provides no compensation whatsoever for disabilities occurring after 1994. *See* 818 F.2d at 179. To support their claim that this issue was addressed on the merits in this appeal Petitioners purport to quote from "Reply Br.of Appellants 16" on page 11 of their brief. Respondents could not locate the quoted language. (JA at 196.)

16. One of the modifications required was to the Class Assistance Program. Despite persistent unsupported representations by both Petitioners (PB at 15, 17, 36) and their *amici*, there is no evidence in the record that any of these funds benefitted Respondents in any way.

but otherwise left intact the payment plan, which provided no benefits for injuries manifesting after 1994. *In Re Agent Orange*, 689 F. Supp. 1250 (E.D.N.Y. 1988). Neither the class representatives nor their attorneys appealed this order, which became final on July 5, 1988.[17]

E. The Ivy/Hartman Cases

In 1989, a few veterans diagnosed with cancer after the *Agent Orange* settlement was consummated filed actions. Their cases were dismissed by Judge Weinstein and affirmed by the Second Circuit on the basis that the Ivy/Hartman plaintiffs, "like all class members who suffered death or disability before the end of 1994, are eligible for compensation from the Agent Orange payment fund." *In Re Agent Orange (Ivy/Hartman)*, 996 F.2d 1425 at 1435-1436 (2d Cir. 1993) (quoting *In Re Agent Orange*, 781 F. Supp. 902, 919 (E.D.N.Y. 1991). While the issue of post-1994 "future" claimants was not before the court and never addressed explicitly, implicit in the court's reasoning was that it might not hold the same way when presented with a case of a post-1994 injured veteran who was receiving nothing.

F. The Depletion of the Ten Million Dollar Indemnity Fund

In the years between 1989 and the termination of the fund in 1994, the state of the science connecting "Agent Orange" to

17. Petitioners attempt to distance themselves from the entirety of the distribution process, however at all times they were aware that they had a shared responsibility to the class, as is demonstrated by Dow Counsel's exchange with Special Master Schreiber:

> SPECIAL MASTER [SCHREIBER]: No. Mr. Rivkin, remember, it is a class action. It is the responsibility of all parties to the case, plaintiffs, defendants, the Judge, the Master, to determine what is appropriate and legal and (sic) fair way of handling a class
>
> MR. RIVKIN: I accept that. (JA at 57.)

specific diseases matured. By 1994, there was little question that exposure to herbicides in Vietnam was related to several types of cancer, including non-Hodgkin's lymphoma and multiple myeloma.[18] A blue-ribbon panel of the National Academy of Sciences' Institute of Medicine reported in 1994 that: "Evidence is sufficient to conclude that there is a positive association between exposure to herbicides (2, 4-D, 2, 4, 5-T . . .) and non-Hodgkin's lymphoma." (JA at 319-322). Despite this finding, class representatives did not move to modify the court's compensation scheme, even though the Rule 23(e) class settlement notice had promised to do so. 597 F. Supp. 869.

The class representatives' indifference to "future" victims was demonstrated again in 1994 when Petitioner Dow Chemical Company moved to transfer the $10 million reserve fund for indemnification, along with accrued interest, to the Class Assistance Program after only 12 years. (JA at 287.) The district court had stated that the ten million dollar reserve fund "will be available to compensate injured Vietnam veterans exposed to Agent Orange should future evidence indicate a legally cognizable link between Agent Orange exposure and specific ailments." *In Re Agent Orange*, 689 F. Supp. 1250, 1259 (E.D.N.Y.) Because this fund was originally ordered to remain in reserve for 25 years, 597 F. Supp. at 864 ¶4, it was incumbent upon Petitioners, the Court, and the class representatives to make sure the fund was used for this stated purpose, as well as the plight of post-1994 uncompensated "future" claimants. In spite of that obvious obligation, neither the class representatives nor their counsel objected to Petitioners' motion. (JA at 287-289.) Nor did anyone appeal. Notice of Dow's motion to transfer the funds was not disseminated, so no absent class members,

18. For instance, scientific knowledge was sufficient by 1991 that the Department of Veterans Affairs determined that non-Hodgkin's Lymphoma was caused by exposure to herbicides in the Vietnam Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991).

including Isaacson and Stephenson, had an opportunity to object. After this final transfer of funds, no funds remained for any veteran who would manifest injuries after January 17, 1995. All funds were disbursed by September 1997. (JA at 238-239, 260-261.)

G. The Stephenson/Isaacson Case

Under the laws of their home states, neither Isaacson, a citizen of New Jersey, nor Stephenson, a citizen of Louisiana, could have brought a cancer claim against petitioners until he was actually diagnosed with cancer. Only when they received their devastating diagnoses did Isaacson and Stephenson learn that Agent Orange exposure had been connected to their cancers by the National Academy of Sciences. (JA at 295-299; 319-325.) As a result, Respondents brought state law tort actions against Petitioners, but they were soon met with Petitioners' *res judicata* defense that Respondents' claims had already been settled for no compensation.

Respondents asserted that the class action could not have settled their cases, because they had no justiciable claim at the time of the settlement, they never received notice with a meaningful opportunity to opt out of the *Agent Orange* class, and they had received no representation as part of the class proceedings, much less adequate representation.

Nevertheless, on December 13, 1999, Judge Weinstein granted Petitioners' motion to dismiss their lawsuits. On appeal, the Second Circuit held unanimously that none of the earlier *Agent Orange* decisions had addressed the adequacy of representation for those members of the class whose injuries manifested themselves after 1994.[19] Recognizing that due process requires notice and an opportunity to be heard, the Second Circuit held that Respondents received neither, and that,

19. The panel included one judge who had sat on the Circuit's panel in the *Ivy/Hartman* case (Judge Cardamone).

in the absence of adequate representation, the class action settlement could not preclude their claims.

SUMMARY OF ARGUMENT

Neither due process nor Rule 23 empowers a court to predetermine the preclusive effect of its own judgment on absent class members. This can only take place in the setting of *de novo* collateral review. The right to collateral review is embodied in this court's prior holdings, over sixty years of case law, the very notes to Rule 23, the comments of every contemporaneous commentator on Rule 23, the Restatement of Judgments, and virtually every court that has been asked to review whether a prior class action court has accorded an absent class member with adequate representation or notice. There is no reason for this Court to revisit this well-settled rule.

To determine whether a prior judgment should bind an absent class member, a court is obliged to review whether due process protections were met: whether the class member was in fact adequately represented at all times in the litigation, was given constitutionally sufficient notice, had an opportunity to be heard, and had an opportunity to opt out from a class certified under Rule 23(b)(3). If he did not, then the absent class member was never properly before the court and no judgment can be final as to that absent class member.

Respondents were deprived of **all** of these basic rights during the course of the *Agent Orange* litigation. While a notice pursuant to Rule 23(c)(2) was sent out by the court, this notice gave Respondents no opportunity to opt out of the class, as they could not have known it was addressed to them. As "future" claimants, it is doubtful whether Respondents could ever be given constitutionally required notice. Nor could the Rule 23(e) settlement notice cure the deficiency in failing to give Respondents 23(c)(2) notice. Yet, even this notice failed to apprize Respondents of the most crucial fact they needed to know in order to assess whether to object or appeal the settlement

— exactly what recovery they might expect to receive from the settlement.

The *Agent Orange* judgment further lacked due process because Respondents had no **separate** representation, as required by *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997), and because they had no representation at all when the class was originally certified. When class representatives were subsequently designated, they all had very real present injuries. Their interests were neither aligned with nor could they be aligned with Respondents. The class representatives both wanted (and received) immediate payments for their injuries, while Respondents had no need to settle, particularly for nuisance value or no recovery at all, and could afford to wait for scientific studies in progress to be completed.

Further, though a court's Rule 23(a)(4) determination of adequacy of representation is made early in the litigation and is inherently tentative, "adequate representation" in the constitutional sense must be present at all times. In *Agent Orange*, the class representatives failed to protect Respondents' needs from the day they were appointed through the day the settlement funds were exhausted. Until Respondents were stricken with their deadly cancers, they had no reason to be before any court. And in the absence of due process, they were never properly before any court. In this setting, Petitioners' request to value "finality" over due process rights rings hollow. At the time Petitioners entered into the settlement, they knew Respondents, as "future" claimants, could seek collateral review.

Indeed, Petitioners effectively invited this review by agreeing to "interpret" Respondents into the settlement class after the opt-out period expired. They remained deaf to pleas for separate representation of "futures," while at the same time moving to deplete the last $10 million that could have been used for Respondents' benefit. Under any standard for collateral review, the lack of notice and opportunity to be heard, the complete absence of representation, and the inability to opt out,

it is clear that Petitioners are not entitled to the defense of *res judicata*.

ARGUMENT

I. ABSENTEES MAY ALWAYS RAISE DUE PROCESS OBJECTIONS IN RESPONSE TO THE DEFENSE OF *RES JUDICATA*

This Court has consistently permitted absent class members to contest the adequacy of representation and notice in later actions. In conducting a collateral review in *Hansberry v. Lee*, 311 U.S. 32, 42 (1940), this Court did not seek to prescribe "any particular rule for establishing the conclusiveness of judgments in class suits." Rather, it concluded that the judgment could only stand if "the procedures were so devised **and applied** as to ensure that those present are of the same class as those absent and that the litigation is **so conducted** as to ensure the full and fair consideration of the common issue." *Id.* at 43 (emphasis supplied).

Later, when Rule 23 was amended in 1966, the Advisory Committee explicitly preserved this right of absent class members to contest the validity of a judgment reached in a representative capacity: "[S]ubdivision (c)(3) does not disturb the **recognized principle** that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action." (emphasis supplied). See Restatement Judgment § 86, Comment (H), § 116 (1942).

This right to seek collateral review was unanimously recognized by all of the commentators writing immediately after the Rule was written. Judge Frankel observed:

> There are, of course, some obvious limitations in any case upon the extent to which absent parties will be concluded. * * * such parties have a **clear right** in some later litigation to attack the judgment which purports to bind them. **In such later case, at least the basic consideration going to the fairness of holding them bound will be open for re-examination. Factors which were not brought to the attention of the first court — including most centrally, the adequacy of representation in the first suit, *cf. Hansberry v. Lee* — may lead to a changed perspective**. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 FRD, 39, 46 (1968), (emphasis supplied).

See also 3B Moores Federal Practice, § 23.60 (2d ed. 1987) (same); Wright & Miller § 1789, pp. 246-46 (2d ed. 1986) (same); 3 Newberg on Class Actions (2d ed. 1985) Sec. 16.24 at p. 345.[20]

Petitioners' arguments concerning collateral review of the adequacy of representation also ignore the Restatement of Judgments. The Restatement gives no deference to the original prediction of adequacy, indicating that collateral review is always available for absent class members who are entitled to

20. The Restatement Second of Judgments, § 42(1)(d) Comment A, also recognizes that:

> [A]dequacy of the representation can be established in the action itself only with respect to such represented persons who have the opportunity to be heard on the representation question. As to others, the question of adequacy can be concluded only if and when a person allegedly represented challenges the judgment's effect on him.

have their claims of a denial of due process reviewed *de novo*. § 42(1) holds that "a person is not bound by a judgment for or against the party who purports to represent him if either "(d) * * * there was a substantial diversion of interest" or "(e) the representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent."[21] If "there is in fact a substantial divergence of interest between [the representative and some members of the class] * * * the judgment is not binding on those whose interests are divergent." *Id.*, Comment e.

The structure of Rule 23 also dictates that the initial court's decision on adequacy cannot be immune from challenge. Rule 23 only requires the court to formally consider adequacy once — in deciding whether to certify the class at all — and this is to be done "as soon as practicable after commencement of (the) action". Rule 23(c)(1). A court's determination, under Rule 23(a)(4) is, therefore, not a conclusion, but a prediction. The court merely anticipates that the chosen "representative parties **will** fairly and adequately protect the interest of the class," while adequacy itself must be maintained "at all times." (emphasis supplied). RB at 3.

As Judge Mehrige stated well before the *Agent Orange* case was settled, a district judge cannot be expected to: "foresee *all* the potential claims that *may* be raised by class members in contesting the adequacy of the class representatives and resolve them, perhaps without specifically pointed argument, in a favorable manner." *Lewis v. Philip Morris Inc.*, 419 F. Supp. 345, 352 (E.D. Va. 1976), (emphasis in original), *vacated on other grounds*, *Lewis v. Tobacco Workers' Intern. Union*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979).

21. The reporter's notes to Comment (e) make it clear that under Subsection (d) "the finding of divergence of interest may, *of course*, be made on collateral challenge."

Thus, because due process requires adequate representation "at all times," any single determination of adequacy is inherently tentative. It cannot anticipate whether the representation will be adequate after appeals are exhausted or after the determination of settlement fairness if there are no appeals:

> [T]he determination by the original class action court to the effect that the representative adequately represented the class members, even though it may be clearly correct when it is made, may not be so at later stages of the litigation and a court being asked to bind an absent class member to a judgment, must evaluate the adequacy of the representation not only in terms of the first court's initial inquiry, **but also in light of whether the representation appears adequate after termination of the suit.** *Wright & Miller* § 1789 pp. 251-252 (1986) (emphasis supplied).[22]

This clearly applies to the *Agent Orange* litigation. After appeals were exhausted and the settlement was finalized, the class representatives never sought to adjust the terms of the payments to reflect scientific developments regarding "Agent Orange" disease causation, (RB at 12, and they permitted the ten million dollar reserve fund to be depleted. (RB at 13.) Both of these actions were contrary to the Rule 23(e) settlement notice. (RB at 13.)

Finally, this Court has on several occasions reaffirmed the rule that a class action court cannot control the *res judicata* effect of its own judgment. "[A]n absent class action plaintiff is not required to do anything (such as intervene to contest adequacy of representation before a judgment becomes final).

22. *See also Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir 1973) (requiring a collateral review of the class representative's conduct during the entire suit, even after termination of the original litigation, to see if the representative adequately protected the interests of the class)

He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection". *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985):[23]

After *Shutts*, in *Martin v. Wilks*, 490 U.S. 755 (1989) this Court even held that a person who had notice and an opportunity to be heard in a class action lawsuit is not required to intervene and could seek review of the resultant consent decree collaterally. (*See also* 3B Moores Fed. Practice at § 23.60 pp. 23-444 n.14.) Petitioners, on the other hand, have not identified a single federal appellate court which has completely refused to conduct a collateral review of the binding effect of a Federal Rule 23 judgment on absent class members.

II. RESPONDENTS RECEIVED NEITHER ADEQUATE NOTICE NOR REPRESENTATION, EACH OF WHICH IS A PREDICATE FOR ANY "FINAL" JUDGMENT TO BE VALID

Petitioners concede that Respondents cannot be bound to a judgment obtained without due process of law. Yet in arguing that Respondents do not have a right to a collateral review, that is precisely what they are trying to do here.

23. In *Shutts*, a Kansas state court held both that it had jurisdiction to bind out-of-state absent class members, and that they were adequately represented by the named plaintiff. 472 U.S. at 803-805. After the Kansas Supreme Court affirmed these rulings, Phillips appealed to this Court, still contending that the lower court lacked jurisdiction over out of state absent class members. The plaintiffs argued that Phillips lacked standing to assert the constitutional rights of the absent class members. This Court ruled that even though the issue of jurisdiction was fully litigated in the Kansas court by a class representative that court found to be adequate, the Kansas court's determination of jurisdiction would not preclude collateral attacks by absent class members. They could still sue Phillips in other fora and relitigate the issue of jurisdiction, which is what gave Phillips standing to raise the issue.

A collateral review is the only opportunity for an absent class member to contest whether he was properly before the class court in the first place. The class court could exercise jurisdiction over an absent class member only if he received "notice plus an opportunity to participate in the litigation" as well as "an opportunity to remove himself from the class" and is adequately represented "at all times". *Shutts*, 472 U.S. at 812 n.24. The reviewing court must be allowed to fully evaluate *all four* of these basic rights as they apply to each individual who comes before the court. If Respondents were denied any of these rights, then nothing could be made "final" as to them. *See Bedel v. Thompson*, 1992 U.S. App. LEXIS 3751 at 16 (6th Cir. 1992). In this, case Respondents were denied all four.[24]

A. Respondents Did Not Receive Constitutionally Adequate Notice

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, (1950). In an action under Rule 23(b)(3), notice must also inform the absent class members of their opportunity to opt out. None of the three "notices" given to the Agent Orange class met these constitutional requirements.

1. The March 1984 Rule 23(c)(2) Notice Did Not Provide Respondents With A Full Opportunity To Opt Out.

At minimum, notice cannot bar an absent class member's claims unless it fully informs the class member of the claims

24. The first Question Presented by Petitioners assumes that Respondents had "a full opportunity to opt out, object and appeal," and that the court "expressly determined" that Respondents were adequately represented in the class action. None of these predicates is true.

included in the class action, as well as the right to opt out.[25] Further, notice ". . . must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." *In Re: Nissan Motor Corp. Anti-Trust Litigation*, 552 F.2d 1088, 1105 (5th Cir. 1977).

The Rule 23(c)(2) notice that went out to Vietnam veterans in March 1984 was only addressed to veterans "who were injured." At that time, neither Respondent was "injured" or claimed injury due to Agent Orange. Nor would either Respondent have paid attention to this notice even if Petitioners had intended the notice to reach them. Absent a proper Rule 23(c)(2) notice, Respondents did not have an opportunity to opt out of the Agent Orange class.[26]

25. *See Garcia v. Collins*, 776 F.2d 841, 848 (4th Cir. 1984) (holding that despite a broadly plead complaint, notice was insufficient to state future claims would be barred); *Twigg v. Sears Roebuck and Company*, 153 F.3d 1222, 1227-1230 (11th Cir. 1998) (the language of the notice has to be sufficient to inform the Claimant of the claims asserted) *Penson v. Traveller Transport Company*, 634 F.2d 989 (5th Cir. 1981) (notice did not inform absent class members of the right to opt out) *Republic National Bank of Dallas v. Denson and Addison Company*, 68 F.R.D. 208 (N.D. Texas 1975) (holding that notice should inform absent class members of possible conflicts of interest so that they can decide whether to withdraw from the class.); *Morgan v. Ward*, 699 F. Supp. 1025 (E.D.N.Y. 1988) (class members' individual claim for damages not barred by class action, because he was not notified that membership in a civil rights prisoners' class would foreclose individual actions for damages.).

26. Neither Respondent ever *received* the 23(c)(2) opt out notice, the 23(e) settlement notice, or the subsequent "distribution notice." (JA at 243-44, 290-293.)

2. Even If Respondents Had Received an Adequate Rule 23(c)(2) Notice, It is Doubtful that Notice to "Futures" Can Ever Be Constitutionally Adequate.

Before the Agent Orange settlement, in 1983, a bankruptcy court dealing with future victims of asbestos poisoning held that a representative of future claimants should not be appointed, because notice could not possibly comply with the requirements of due process. *In Re: UNR Industries*, 29 BR 741 (B. ND. Ill.) (1983). While questioning the bankruptcy court, the Court of Appeals stated that giving informed notice to "futures" would be a "formidable, and possibly insurmountable" task. *In re UNR Industries*, 725 F.2d 1111, 1119-20 (7th Cir. 1984).

Because "futures," such as Respondents, have not manifested any injury, it is unlikely that they will pay any attention to a class notice designed to compensate others for injuries they do not share. In *Amchem*, 521 U.S. at 628 this Court recognized that effective notice requires knowledge of one's stake in the outcome:

> Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm that may incur. Even if they fully appreciate the significance of the class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Without an injury, Respondents had no reason either to participate in the litigation, or opt out of it.[27]

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27. Although the court below also recognized the due process concerns inherent in the difficulty of giving such notice, stating, "[w]e also note that plaintiffs likely received inadequate notice," PFC 19a n.8, Petitioners utterly fail to address this issue.

3. The June 1984 Rule 23(e) Settlement Notice Did Not Cure These Defects, As It Neither Provided A Right to Opt Out Nor Did It Inform Respondents Of Their Right To Object To The Adequacy Of Their Representation.

Petitioners insist that Respondents had the opportunity to be heard on adequacy of representation and the sufficiency of notice, because the June 1984 Rule 23(e) notice allowed absent class members to object to the settlement while specifically, albeit inconspicuously, informing them for the first time that the settlement included veterans "who had not yet manifested injury." RB 5. However, notice of the right to object to a settlement does not, by itself, protect other due process rights. *Penson v. Traveller Transport Company*, 634 F.2d 989, 995 (5th Cir. 1981).

The right to object is far more limited than the right to "opt out." In Agent Orange, although the vast majority of veterans appearing at the hearings did "object" to the settlement, Judge Weinsten was free to find them collectively unpersuasive. 597 F. Supp at 761; *see, e.g.*, (JA at 134, 136). RB at 7 n.11. While objecting only allows an absent class member to be heard on inequities in a settlement that has already been negotiated, opting out absolutely preserves an individual's right to trial.[28]

Nor can notice under Rule 23(e) "be read to require absent class members to present objections to the adequacy of

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28. One absent class plaintiff did complain that; 1) there was a conflict in the class between "present" and "future" claimants; 2) those class members who were unaware of injury could not be expected to make informed decisions; and 3) under the laws of many states, the claims of "futures" had not even accrued.(JA at 122-125). His objections were never even addressed in any court decision. Had this highly sophisticated veteran been given an opportunity to opt out, it would have obviated the need for his futile objection. But he never had that opportunity, because he never saw the Rule 23(c)(2) notice, (JA at 124 at n. 3), Petitioners would bind him to the settlement anyway.

representation in a hearing not designed to determine the adequacy of the representation." Patrick Woolley, *The Availability of Collateral Attack For Inadequate Representation in Class Suits*, 79 Texas Law Review, 383, 400 (2000). The Agent Orange Rule 23(e) notice never informed "futures" they could object to the adequacy of their representation nor did it disclose that their representatives had only "present" claims.[29] The notice posed a much different question: "whether this settlement **as a whole** is fair, reasonable and adequate." (JA at 109.) (Emphasis added).

Petitioners were aware that "futures" had not been given a right to opt out and they could have requested a new Rule 23(c)(2) notice. They could also have asked for a Rule 23(d)(2) notice, "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given" so as to allow class "members to signify whether they consider the representation fair and adequate." Petitioners chose neither. Instead, they preferred to bind unrepresented "future" claimants to the settlement with no separate representation or opt out right. RB 5-6.

4. The 1985 Notice Of The Distribution Plan Was So Defective That It Denied Respondents Any Opportunity To Object To or Appeal The Plan.

It was not until the distribution was finalized that "futures" could have known that they would receive less than "present"

29. Indeed, one of the commentators cited by Petitioners' amici wrote that in order to "obtain a high degree of protection against subsequent successful collateral attack in another proceeding" the notice of settlement "should specify that adequacy of representation is an issue in the fairness hearing" and "counsel for all parties should also take pains to establish a record on adequacy in the fairness hearing." Geoffrey P. Miller, "*Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*," 73 N.Y.U. Law, 1167, 1175-76. None of this was done in the original *Agent Orange* litigation.

claimants and, that the fund to pay "settlements" would be fully disbursed by the end of 1994. However, the distribution order announcing this *fait accompli* was directly disseminated only to those who had already made claims, i.e. "present" claimants. Otherwise, it was only transmitted by word of mouth through a number of veterans' organizations and was not reasonably calculated to reach Respondents, who belonged to none of them. (RB 10)[30] Thus, the most critical piece of information that Respondents needed in order to make an informed decision about whether to object to or appeal the settlement — what prospective recovery they might anticipate receiving — was never made available to them, even by publication.

B. Respondents Did Not Receive Adequate Representation

Well before the settlement was ever contemplated in *Agent Orange*, this Court ruled that due process required that there be an identical alignment of interest between any "virtual representatives" and individual absent class members they seek to represent. *Hansberry v. Lee*, 311 U.S. 32 at 45 (1940) Subsequently, Rule 23(a)(4) was amended to strengthen this specific protection for absent class members. However, here it is clear that Respondents did not receive "adequate representation," as it was non-existent at the time of class certification, not aligned with their needs at the time of settlement, and indifferent to their needs throughout the course of the proceedings.

30. This utter lack of notice contrasted sharply with other contemporaneous decisions imposing strict notice requirements. For instance, in the case of persons exposed to DES but not yet injured, the court held that "due process * * * requires *actual* receipt of notice before a judgment may bind class members." *Payton v. Abbott Labs*, 83 F.R.D. 382, 393 (D. Mass. 1979). *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 157 (1974).

1. The Class Certification Did Not Comply With The Requirements of Rule 23(a)(4).

At the time the class was certified, Rule 23(a)(4) was never even applied to class representatives, as no representatives were selected either at the time of Judge Pratt's provisional certification or at the time Judge Weinstein's class certification. RB 2-3. Both judges stated only that adequacy of representation was "speculative," because it was being "made at the time of a class certification when the facts have not been fully developed." 100 F.R.D. at 726. Clearly without any representation at all, Petitioners cannot state that Respondents were "adequately represented." According to Petitioners' own analysis. The failure to evaluate class representatives *before* granting class certification renders the *Agent Orange* class suspect (PB at 27-29).

2. Even After Class Representatives Were Appointed, There Was No Alignment Between The "Present" Class Representatives and the "Futures" They Sought to Represent.

Before the *Agent Orange* settlement occurred, a variety of courts, in different contexts, held that any attempts by "present" claimants to represent "future" claimants raised due process concerns.

In cases involving certification or settlement approval of classes consisting of present and future victims of discrimination, the reviewing courts generally held that future claimants had nothing to gain and everything to lose by being subjected to the binding effect of a judgment when their a cause of action had yet to accrue. *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624 (1981) (W.D. Arkansas) (holding that allowing

present employees to represent future employees would violate due process considerations).[31]

In the bankruptcy arena when attempts were made to regulate the claims of potential "futures", courts consistently required separate representation. *In Re: Amatex Corporation*, 755 F.2d 1034, 1042-1043 (3d Cir. 1984) ("future claimants require their own spokesperson" because other parties involved in the proceeding had different interests."); *In Re: Johns Manville*, 36 B.R. 743 (Bkcy. S.D.N.Y. 1984), (holding that attorneys for claimants who had present claims had a "stake in maximizing recovery from the reorganizing Manville [which] may be antithetical to the expectations of future interests" in that **"such representation indeed has the potential for being inadequate given this conflict of interest problem."** The court concluded that "an independent representative for future claimants is essential.") (36 BR at 749.)[32]

Finally, in other mass tort class actions in the 1980's, courts recognized the clear conflict which existed between present and "future" claimants. For instance, in *In Re: Bendectin Products Liability Litigation*, 749 F.2d 300, 304 n.8 (6th Cir. 1984) when a class including "futures" was certified, the Court of Appeals granted a writ of mandamus to vacate the certification, stating that the same counsel could not represent both present and future

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31. *See Scott v. University of Delaware*, 601 F.2d 76, 89 (3d Cir.), *cert. denied*, by *Estate of Scott*, 444 U.S. 931 (1979); *Freeman v. Motor Convey, Inc.*, 68 F.R.D. 196, 200 (N.D. Georgia 1974); *Moore v. Western Pennsylvania Water Company*, 73 F.R.D. 415, 453 (W.D. Pa. 1977).

32. The *Johns Manville* opinion was affirmed at 52 BR 940, 943 (1985), again with the understanding it would not attempt to discharge the claims of future claimants. It was reaffirmed in *Kane v. Johns Manville Corp.*, 843 F.2d 636 (2d Cir. 1988), holding that Kane, a present claimant, lacked standing to assert the future claimants' due process rights to adequate notice, because his interests were actually in conflict with the futures. *Id.* at 643-644.

claimants because both groups "are inherently in conflict with each other for their share of the settlement" and the present subclass "had the incentive to try to minimize the size of the [future subclass] in order to increase [their] share of the settlement."[33]

This Court in *Amchem*, 521 U.S. at 626-27 then followed settled law in addressing the inherent conflicts between present and future claimants:[34]

> In significant respects, the interest of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring ample, inflation-protected fund for the future.

33. *See also Payton v. Abbott Laboratories*, 100 F.R.D. 336, 338 (D. Mass. 1983) decertifying a class which included future claimants because their claims were not yet cognizable.

34. Petitioners' Second Question erroneously assumes that *Amchem* established new law. Arguably, under *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (Scalia, J., concurring in judgment (1991)), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 548-54 (1991), the Court cannot "make" new law at all, but rather "finds" the law as it has always existed. Under that view, it is impossible that "new law" was applied here. Even under the now discredited non-retroactivity rule of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *Amchem* or *Ortiz* did not announce a new rule. A rule cannot be "new" unless it "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, (citation omitted), or by deciding an issue of first impression whose resolution was not clearly foreshadowed. (citation omitted)." *Chevron* at 106. Petitioners point to no cases that *Amchem* overruled, and do not explain how the class judgment relied on earlier cases compelling a contrary result. *Amchem* and *Ortiz* "are not exactly novelties." *Crawford v. Equifax Payment Services*, 201 F.3d 877, 882 (7th Cir. 2000) (Easterbrook, J.). They apply the terms of Rule 23, and thus the principle of law on which they rest — merely that federal courts must follow the Federal Rules of Civil Procedure — hardly a novel concept.

Amchem, 521 U.S. at 626. This Court therefore concluded that a class action settlement could not bind absent class members unless each of the subgroups with divergent interests — most notably present claimants versus future claimants — was represented by members of that distinct subgroup who would protect the interests of that subgroup only:

> The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup **cannot be bound to a settlement** except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

Id. (citations omitted) (emphasis added). Under *Amchem*, a settlement on behalf of both currently-injured and exposure-only plaintiffs reached by currently-injured plaintiffs **cannot** be binding on persons who at the time of settlement had not yet manifested injury.[35]

This holding, which expressly followed the intent of the framers of Federal Rule 23, as amended in 1966, was reaffirmed by this court in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999):

> [I]t is obvious that a class divided between holders of present and future claims (some of the latter involving no physical injury . . .) requires division into homogeneous subclasses under Rule 23(c)(4)(b), with separate representation to eliminate conflicting interests of counsel.

Id. at 854-56.[36]

35. Indeed, unlike *Agent Orange*, the class representatives in both *Amchem* and *Ortiz* included "futures." *Amchem*, *supra* at 603; *Ahearn v. Fibreboard* 1995 US Dist Lexis 11532 at *195 (E.D. Tex), *aff'd sub nom, in re Asbestos Litigation*, 90 F.3d 963, *reversed*, *Ortiz*, *supra*.

36. Petitioners argue that *Amchem* and *Ortiz* were decided under Rule 23(a)(4) and not the Due Process clause. This ignores the fact that (Cont'd)

Thus, when class representatives were finally selected in the *Agent Orange* litigation, their interests had to be aligned with "future" plaintiffs. Because all of the class representatives had very significant present injuries (RB at 3-4) their interests were clearly not aligned with the interests the interests of Respondents. (RB at 5-6, 8-10.)

The class representatives had no choice but to pursue their present injury cases, while Respondents had time for scientific studies evaluating causation to mature. Settling particularly benefitted the many "present" claimants whose claims had statutes of limitations problems. *In Re Agent Orange*, 597 F. Supp. at 800-816. Respondents had no such concerns. The class representatives also had an incentive to settle, even for "nuisance" value, because their illnesses caused very real financial pressures, including the present costs of treatment, while Respondents did not share these financial pressures.

To be sure, Petitioners and their *amici* attempt to escape this clear mandate of *Amchem* on the grounds that the class in *Amchem* was a settlement-only class, whereas the *Agent Orange* class was first certified for litigation. However, in *Amchem*, this Court expressly noted that the Rule 23(a)(4) prerequisite of adequacy of representation is the same for a settlement class as it is for a litigation class. *See* 521 U.S. at 620-621. Moreover, "future" claimants may need even more protection in a litigation class than a settlement class, given that costs incurred in preparing for trial are substantial, and the incentive to recoup

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Rule 23(a)(4) exists to protect due process rights. Petitioners do not, and cannot, explain how a judgment obtained against an absentee who was not adequately represented complies with due process of law.

those costs can unduly influence settlements, as the Second Circuit found here. RB 11.[37]

3. The Representation Provided By The Class Representatives Was Inadequate From the Day That They Were Appointed To The Day Funds Were Disbursed.

Courts have a duty to thoroughly and scrupulously examine the actions of class representatives at every stage of the proceeding in order to make sure they provide adequate representation for absent class members. *See Guerine v. J&W Investment Company*, 544 F.2d 863 (5th Cir. 1977). Thus, adequacy of representation is not only determined at the time of class certification, but at every other stage, including discovery, the pre-trial stage, and trial, *see Johnson v. Shreveport Garment Company*, 422 F. Supp. 526 (W.D. LA 1976)); post trial modifications of court orders, *Crawford v. Honig*, 37 F.3d 485, 488 (9th Cir 1994) the award of attorneys fees *National Association of Regional Medical Program, Inc. v. Matthews*, 551 F.2d 340 (D.C. Cir. 1976) and the failure to appeal *Gonzalez v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). In sum, as this Court has stated, due process requires adequate representation "at all times." *Shutts*, 472 U.S. at 812 (1985).

However, the *Agent Orange* class representatives repeatedly failed to provide Respondents with adequate representation: 1) their attorneys certified a class without appointing any class representatives; 2) the representatives entered into a settlement

37. Petitioners turn the arguments made by the proponents of *Amchem* on their head. In *Amchem* the proponents of the settlement argued that the Rule 23(a) requirements should be *less* stringent given the circumstance of a settlement class rather than *more* stringent as Petitioners' brief herein avers. This Court in *Amchem* followed the Third Circuit by stating that there was no basis to distinguish a "settlement only class" for special *less stringent* treatment regarding Rule 23(a) and (b) issues, including adequacy of representation.

knowing that the definition of the settling class given 23(c)(2) notice was being "interpreted" to include persons, such as Respondents, who were not reasonably a part of that class, 3) they failed to insist that a class representative who had not yet manifested injury be appointed to represent the "futures," such as Respondents, 4) they agreed to settle Respondents' "future" claims for "nuisance" value or less, knowing that scientific studies were ongoing and that "futures" had no urgency to settle; 5) they failed to object to the fact that compensation for all veterans would be allowed to terminate in 1994, despite specific contrary representations made in the Rule 23(e) settlement notice; and 6) they agreed to a compensation scheme which was skewed towards increased payments for "present" claimants. (RB 5-10).

After final approval of the settlement, the class representatives continued to ignore Respondents' interests. They failed to monitor the ongoing science and request that payments be adjusted to compensate injuries which bore a scientific relationship to Agent Orange, as had been promised in the 23(e) notice. They failed to object when the ten million dollar fund was depleted without regard to the needs of veterans who would manifest injuries after 1994[38]. Far from adequately representing Respondents "at all times," "present" class representatives did not represent Respondents at **any** time, as is demonstrated by the result they obtained for Respondents.

38. *See Crawford v. Honig*, 37 F.3d 485, 488 (9th Cir. 1994), holding that because absent class members were not adequately represented in a post-settlement modification of a class-wide injunction, *res judicata* did not bar them from collaterally attacking the proceedings.

III. RELEASING UNACCRUED "FUTURE" CLAIMS WITHOUT SEPARATE REPRESENTATION VIOLATED ARTICLE III OF THE U.S. CONSTITUTION, AND DEPRIVED RESPONDENTS OF STATE LAW RIGHTS UNDER THE GUISE OF RULE 23 PROCEDURES

Under the Rules Enabling Act, a Federal Rule may not "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). Rule 23 does not change the substantive law of *res judicata*, which only precludes claims that were litigated or could have been litigated in the prior action. *Heiser v. Woodruff*, 327 U.S. 726, 735 (1946).

The cancer claims of Respondents could not have been individually litigated in the prior *Agent Orange* case, which sat pursuant to diversity jurisdiction on assignment from the MDL panel, because Respondents' claims had yet to accrue.[39] *Ayers v. Jackson Township*, 106 N.J. 557, 583, 561 A.2d 287, 300 (1987) (holding in New Jersey that claim preclusion cannot apply, because the claim could not have been joined with earlier claims, such as property damage; or medical monitoring, as it did not accrue until the disease manifested.) *Breaux v. Mine Safety Appliances Co.*, 717 So.2d 1255 (La. App. 5th Cir. 1998) (holding in Louisiana that an asbestos victim who had released his exposure claim was not barred from pursuing a claim for mesothelioma resulting from the same exposure which manifested itself 16 years after the prior settlement). *Cole v. Celotex*, 599 So.2d 1058, 1086 (La. 1992) (Dennis J. concurring).

These rules are for the benefit of both the tortfeasor and the victim; the tortfeasor is spared lawsuits for damage that may never occur, while the victim is protected because "to award

39. *See also Schweitzer v. Conrail*, 758 F.2d 936 (3d Cir. 1985) where the court held that unmanifested injury claims of persons exposed to asbestos could not even be litigated in bankruptcy, because the claims had yet to accrue.

damages based on a mathematical probability would significantly undercompensate those who actually do develop cancer." *Ayers*, *supra*, 561 A.2d at 300.

Moreover, while neither of Respondents' claims presented a "case" or "controversy" in 1984, had either of their individual cases been reduced to judgment in favor of the Petitioners, that judgment would still not have barred Respondents' claims for cancer first diagnosed after the judgment. *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18 (2d Cir. 1981) (Friendly, J.) If a judgment after a trial still cannot extinguish these state law claims, neither should a judgment approving a settlement that has been entered in a representative capacity. *Id.* This is especially so when the class representatives themselves have not asserted the claims which they are agreeing to extinguish. *Id.*

IV. PETITIONERS' EQUITABLE ARGUMENTS AND SUGGESTED ALTERNATIVE STANDARDS FOR COLLATERAL REVIEW HAVE NO BASIS IN BINDING CASE LAW OR THE CONSTITUTION ITSELF, BUT EVEN UNDER THEIR PROPOSED STANDARDS THE DECISION OF THE COURT BELOW SHOULD BE AFFIRMED, AS THE BALANCE OF EQUITIES RESIDES WITH RESPONDENTS

1. Applying Petitioner's Proposed "Procedural" Test Developed From *Epstein III*, While Inconsistent With Due Process, Would Still Require the Judgment to Be affirmed.

While ignoring all of the cases which have permitted full collateral review, Petitioners base their argument for a limited review on one Circuit Court case, *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999). *Epstein* involved a challenge to a Delaware state court securities class action., Pursuant to the Full Faith and Credit Statute, 28 U.S.C. § 1738, the divided *Epstein* court looked to Delaware law which, the court held,

provided no right for absent class members to seek collateral review of the validity of a settlement so long as the certifying court determined that the criteria of adequacy of representation had been met. 179 F.3d 647 at n.6. The *Epstein* court found that "limited collateral review" was appropriate "to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a full and fair opportunity to litigate the claim or issue."[40] *Id.* at 648-9. Significantly, this "*Epstein* test," developed by Judge O'Scannlain, has never been applied to any other federal court class action judgment, including in its own circuit. *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 852-53 (9th Cir. 2000) (O'Scannlain, J. dissenting).[41]

Nevertheless, even under the logic of *Epstein III*, the Agent Orange judgment cannot stand. The procedures in Agent Orange were not only deficient, but often nonexistent. Rule 23(a)(4) was not complied with, as adequacy of representation was not truly determined at the time of class certification given that there were no "representatives" who were determined to be adequate. Rule 23(c)(2) was not complied with, as no notice was ever directed to Respondents who were not "injured."[42]

40. The **only** academicians whom Petitioners assert to be in favor of their proposition, Professors Kahan and Silberman, would similarly allow a limited collateral review to determine whether the process used to determine adequacy of representation and sufficiency of notice in the original forum was so flawed as to violate due process of law. Kahan and Silverman, "*The Inadequate Search for Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. Law Review, 765, 788-89.

41. *See also Brown v. Ticor Title Insurance Company*, 982 F2d 386, 390-91 (9th Cir 1992). *cert dismissed*, 511 U.S. 117 (1994) (allowing collateral review, employing test of Restatement (Second) Judgments Sec. 42(1)(2)). *Supra* pp. 18-19.

42. Unlike the *Epstein* court, the Second Circuit was not only reviewing a Federal court judgment, it was reviewing its own approval

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All of the equitable considerations which might have compelled the *Epstein* court to create a novel standard for collateral review were absent in the *Agent Orange* litigation. While the *Epstein* dissidents had every possible opportunity to opt out of the Delaware settlement, object to its terms, or pursue a direct appeal of the Delaware state court's approval of the settlement, "future" claimants, such as Respondents "are, by definition, persons who have not developed a sufficient interest in their claims to file suit; thus, they are likely to be passive and particularly vulnerable to exploitation." *Flanagan v. Ahearn*, 90 F.3d 963,1000 (5th Cir. 1996) (Smith, J. dissenting), *judgment rev'd*, *Ortiz*, 527 U.S. at 594-95. Further, the *Epstein* dissidents at the time of the settlement had counsel who was fully cognizant of the Delaware proceedings but made a strategic decision not to object in order to seek review in another forum. *Matsushita Elec. Indus. Co. v. Epstein* oral argument No. 94-1809, 1995 U.S. Trans Lexis 108 at 43, Respondents, with neither injuries nor damages, had no reason to even consider obtaining counsel.[43]

2. Petitioners Use Doctrines Developed in *Mathews* and the *Habeas Corpus* Setting to Construct Tests Which Are Utterly Inappropriate For Judgments Rendered Against Absent Class Members, Yet Even Under Those Tests The Court Below Should be Affirmed.

Petitioners assert that a court considering a res judicata review should begin with an analysis of whether the "benefit" to Respondents of due process "safeguard[s] is substantially

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of a judgment. Therefore, it could authoritatively state that it had not previously considered the issue of adequacy for post-1994 Agent Orange claimants and also reconcile its decision with *Epstein*. (PFC at 14a and n.6)

43. Future claim class actions present the extreme example of lawyers operating without clients." J. Coffee, "*Class Wars, The Dilemma of the Mass Tort Class Action*," 95 Colum. L. Rev. 1343, 1432 (1995).

outweighed by the cost of providing such protection." (PB at 41). Using a strained construction of this court's analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and the procedures developed in *habeas corpus* proceedings, Petitioners then propose that this court develop an entirely new balancing test to assess whether a collateral review should be undertaken: "class members must demonstrate both the conflict caused them *actual* prejudice and the contravening reliance interests in the judgments on the part of the other affected parties are minimal." (PB at 44).

However, even under the heavily unbalanced test that Petitioners have designed, Petitioners would still not succeed. The actual prejudice to Respondents is obvious. Respondents had no reason to liquidate their claims for life-threatening illnesses for nothing, or even "nuisance value." They had every reason to wait to see if they developed an Agent Orange related disease before they brought a claim. They had every right and wish to have the merits of their cases judged on the state of scientific knowledge at the time their claims accrued. *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 630-31, *aff'd sub. nom*, *Amchem Prods. Inc. v. Windsor, supra*.

Looking at the effect on the "parties" prong of Petitioners' balancing test, class representatives cannot be affected by anything this Court decides. The "present" claimants and the class representatives were paid for their injuries long ago.

This leaves Petitioners as the only other "parties" to their own test. They argue prejudice solely based on the fact that they have already paid a sum of money into a settlement fund and were then free to discharge all of their responsibilities to the class. They argue this prejudice, asserting that they are prejudiced unless this court wholeheartedly approves their reliance on a settlement in which they resolved 2.4 million "putative" claims (not including spouses and children) for an average of 75 dollars per claim.

Petitioners were not innocent bystanders to the lack of due process accorded Respondents. They were participants. Petitioners were not only aware of the conflicts between the class representatives and future claimants; they *created them* by insisting that the settlement class be expanded to include futures when they had previously insisted that the claims of futures were not justiciable. (RB at 2 n.3, 5 n.8). They knew that the original notice was insufficient to inform futures that they would be included in the settlement. They saw to it that no new notice and opt out period were given. They were aware of requests for separate representation for future claimants but neither joined in those requests nor supported them in any way. Petitioners knew the payment program failed to adjust for scientific developments regarding causation, despite the 23(e) notice which went out, and it was Petitioners themselves who moved to deplete the $10 million reserve fund, ignoring the interests of post-1994 "futures," including Respondents.

In any case, nothing in the history, structure or extensive judicial interpretation of Rule 23 and due process includes a requirement that the contravening reliance interests in a judgment on the part of other affected parties must be "minimal." Petitioners' suggested test must be rejected because it:

> is simply a variation of the position put forward by the proponents in *Amchem*, who tried to discount comparable failure in that case to provide separate representatives for subclasses with conflicting interests. . . . "Nor does it answer the settlement's failures to provide structural protections in the service of equity to argue that the certified class members' common interest . . . was so weighty as to diminish the deficiencies beneath recognition here. * * * (citing, e.g. ***In re "Agent Orange" Product Liability Litigation***. . . .) . . . The current

> position is just as unavailing as its predecessor in *Amchem*. There we gave the argument no weight, see 521 U.S. at 625-628, observing that "the benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration," * * * Here, just as in the earlier case, the proponents of the settlement are trying to rewrite Rule 23; each ignores the fact that Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity . . ."

Ortiz, *supra* at 858 (emphasis supplied).

In fact, the countervailing policy concerns upholding this settlement are far less weighty than they were in either *Amchem* or *Ortiz*. In those cases, there was a serious concern that a global solution was needed to assure funds would be available for future claimants. *Amchem*, *supra*, at 637-38 (Breyer, J. dissenting) (noting that the trial court expressly found no conflicts, and that futures were adequately protected); *Ortiz*, *supra*, at 878-881 (Breyer J. dissenting) (same). The *Agent Orange* court never found that the risk of depletion of Petitioners' assets justified an abridgment of their future rights. To the contrary, the district court expressly found that Petitioners had sufficient funds to pay any prospective claims. 597 F Supp at 761.

Finally, the legal bases upon which Petitioners assert their balancing tests have fundamental flaws when applied to absent class members. *Mathews v. Eldridge*, simply doesn't come into play when a court lacks jurisdiction. When an absent class member does not receive adequate representation or clear notice with a right to opt out the settling court has no jurisdiction over the claimant in the first place.[44] *Shutts*, *supra*.

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44. This also disposes of the argument that a collateral review should be given no greater scrutiny than the "abuse of discretion" (Cont'd)

Furthermore, although Petitioners and their *amici* argue at length that Respondents have no constitutional right to collateral review under their permutation of *Mathews*, there is no need to even reach the constitutional issue. Rule 23 plainly authorizes collateral review. (RB at 17-20.)

Petitioners' comparisons to *habeas corpus* proceedings are equally unavailing. In *habeas*, the accused has already been personally before the court in the underlying proceedings. "Adequacy of representation" is firmly embedded in *habeas corpus* review. Justice Harlan stated that the right to counsel in a criminal trial was the kind of "bedrock procedural element" which must be applied retroactively in *habeas* proceedings if this Court is to be faithful to the fundamental principles in the Bill of Rights. *Mackey v. United States*, 401 U.S. 667, 693-694 (1971) (Harlan J. concurring), citing *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963); Harlan, J., concurring.[45]

3. Petitioners' Request For "Finality" In the Face Of Due Process Violations Was Long Ago Rejected By This Court.

Petitioners had no "due process" right to expect "finality" simply because they paid a settlement to a class. Petitioners knew that in 1984 there were serious questions as to whether personal injury class actions could be used to settle "future" claims on behalf of an entire class, just as they knew that "future"

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standard on direct appeal. An appeal assumes that the party appealing was previously heard in the lower court. An absent class member seeking collateral review argues that the court lacked jurisdiction which is reviewed *de novo*.

45. Respondents were far more helpless in this case than Clarence Earl Gideon was in trying to represent himself against a seasoned prosecutor in a Florida courtroom. Gideon made an opening statement to the jury, presented witnesses in his own defense, cross examined the state's witnesses and made a closing argument. 372 U.S. at 337.

claimants likely didn't even have a cause of action. (RB at n.3) Furthermore, a quick review of any first year casebook on civil procedure in 1984 would have apprized them that absent class members were entitled to *de novo* collateral review of notice and adequacy of representation. As has been observed:

> [I]t is probably impossible to guarantee prospectively the conclusive effect of a class suit judgment. However, that is not really a serious objection to the class suit procedure * * * A litigant always remains free to say there was no actual service of process or that due process was invalid in some respect or that the proceeding was invalidated by fraud, and so on. G. Hazard, J. Gedid and S. Sowle, *Historical Analysis of the Binding effect of Class Suits*, 146 U of Pa. L. Rev. 1849, 1946 (1998).

That the desired goal of finality does not permit representatives with present interests to abridge the due process rights of "futures" was first decided by this Court well over a century ago. In *McArthur v. Scott*, 113 U.S. 343 (1885), the question was whether present claimants could bind future, unborn heirs through "virtual representation".[46] The present

46. In *McArthur*, *supra*, McArthur left a will that gave income from certain land to his children for their lives and directed that, when the children had all died and the last grandchild had reached the age of 21, the properties were to be distributed to his grandchildren. All of the sons contested the will and named all the other living heirs in that suit, including parents of several grandchildren to act as *guardians ad litem* for the latter. None of the defendants contested the allegations, and the will was found invalid. The property was distributed to the children and portions of the property were sold off to *bona fide* purchasers. After thirty years passed and the youngest grandchild reached the age of 21, some of the grandchildren filed suit against the other grandchildren and the transferees of the property claiming the will was valid and the title of the property should be returned to them. The Court ruled in their favor, holding that the interests of those grandchildren
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claimants, who were successful in the original action, relied upon that success in distributing and selling the property in question. *Id.* at 392. Notwithstanding immensely important judicial policies favoring finality in real estate transactions, this Court held that the judgment was not binding on the grandchildren when they brought suit thirty years later:

> To extend the doctrine of constructive and virtual representation, adopted by courts of equity on considerations of sound policy and practical necessity, to a decree like this, in which it is apparent that there was no real representation of the interests of these plaintiffs, would be to confess that the court is powerless to do justice to suitors who have never before had a hearing. *Id.* at 404.

To protect the absent class members who had no representation, the Court held that the post-judgment partition of the land among the heirs at law, and their conveyances to third persons for valuable consideration, could not affect the title of the grandchildren, who were allowed to retake the properties over the claims of subsequent purchasers.

Similarly, in *Hansberry*, this court reiterated the principle that finality of judgments, no matter how desirable, must be subordinate to due process of law, and reversed the Supreme Court of Illinois, which had valued finality more highly. (*See Lee v. Hansberry*, 372 Ill. 369, 24 N.E.2d 37, 39 (1939)).

While Petitioners may desire that this Court defer to their reliance interest in the judgment, such deference must fail before the law authorizing de novo collateral review and the fact that Respondents have no other means of review.

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were not adequately represented in the first proceeding, because the heirs who were joined in the action, did not have an interest in upholding the will.

4. Petitioners' Fears For The Legal System Are More Imagined Than Real; The Real Catastrophe Would Be If Collateral Review, An Essential Element in the Array of Due Process Protections For Absent Class Members, Is Limited.

Petitioners and their *amici* cite a parade of horrors which will be visited upon the nation's judicial system should Respondents prevail. Yet, they present no evidence that this has occurred in the past nor any likelihood that it will occur in the future., "[C]ollateral attack has been used relatively sparingly to attack the adequacy of representation." Mollie Murphy, "*The Intersystem Class Settlement; of Comity, Consent and Collision*," 47 U. Kan. L. Rev. #13, 469 (1999). One commentator reported that his research revealed only 44 federal and state cases since the 1966 amendments to Rule 23 in which absent class members collaterally attacked a judgment based on inadequate representation. Woolley, *supra* at 443, n. 268.

Moreover, no one with knowledge of a significant stake in the outcome of litigation would likely sit back and refuse to opt out or object, just to seek collateral review. Opting out is simple. Even objectors in fairness hearings can challenge the fairness and adequacy of a settlement, whereas collateral attacks are narrow in scope and more costly to bring, requiring attorneys to engage in extensive litigation of *res judicata* questions before even getting to the merits of a case. G. Miller, *Full Faith and Credit to settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. Rev. 1167, 1185; *Woolley*, *supra*, at 444. In this case, for example, it has been approximately four years since Respondents brought their cases and they still have not learned whether they can even proceed.

Despite this, Petitioners state that Respondents, as absent class members who subsequently became "dissatisfied" with their settlement, should not be permitted to "second guess"

a finding of adequacy. (PB at 22) However, Respondents, as "futures," could not even make a "first guess" at the time of the settlement.

Indeed, at the time of the settlement, when presently injured objectors attempted to assert objections on behalf of "future" claimants, Respondents, despite knowing that "future" class members had neither received notice nor adequate representation, never tried to remedy the infirmities in the settlement but instead proceeded to argue to the Court that the parties raising the complaints had no standing to raise these complaints on behalf of "futures:" "Appellants fail to show any violation of their own rights, but instead focus on **conjectural abridgments** of the rights of **phantom class members** who they concede **are unknown and have manifested no injury** related to the allegations in this litigation." March 10, 1986 "Brief for Defendants-Appellees" submitted to the Second Circuit in response to the appeal of the Settlement at p. 18 (emphasis supplied). Thus, while Petitioners now argue that Respondents cannot collaterally "second guess" the settlement, they argued at the time of the original litigation that any such "guessing" would be both conjectural and not worthy of the court's consideration. Petitioners cannot have it both ways.

Moreover, if as Petitioners contend, this Court were to decide that "futures" may not seek a collateral review of the adequacy of representation, then the holdings of *Amchem* and *Ortiz* will be rendered meaningless. A court could approve a class action settlement in violation of *Amchem*, which "future" claimants, having no vested interest in, would be unlikely to challenge, especially while facing significant transaction costs in a distant court. These unchallenged, erroneous findings of adequacy and notice would then be binding on all "future" claimants, so long as the settlement court adhered to the

formalities of providing hearings and giving notice,[47] even if potential objectors were bought out and no class member appealed.

The likelihood for abuse under this scenario is overwhelming. Victims of devastating diseases would lose all rights to compensation without receiving any **effective** notice or representation as the result of actions occurring in distant courts years before their claims ever accrued. Their claims would be pre-empted by the legislative-like establishment of useless "term insurance policies," while they would be required to rely upon random class members to present any objections they might have had.

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47. According to Petitioners' logic (PB at 35, n.10) a court would be immune from collateral review even it it had failed to provide adequate notice so long as it made an affirmative finding, erroneous though it may be, that the notice given was adequate.

CONCLUSION

Petitioners have bought 19 years of peace for "nuisance" value, while Respondents, diagnosed with cancer between five and seven years ago, have yet to have their day in court. Respondents have waited long enough. The judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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We showed in our opening brief that respondents are not entitled to relitigate, de novo, the adequacy of their representation in the Agent Orange class action. *First*, as long as the courts in that action followed procedures consistent with due process in making the adequacy determination, that determination is binding on respondents as part of the *res judicata* effect of the final judgment. *Second*, even if respondents are permitted to relitigate adequacy now, such a collateral attack must meet a high standard and may succeed only if the courts are persuaded that the prior determination was fundamentally unjust.

Rather than answer these arguments, respondents spend most of their brief attempting to show that the class action district and appellate courts ran roughshod over their rights. But this is a caricature, perhaps drawn from too-swift and collusive settlements in other cases. In *Agent Orange*, two district judges and the court of appeals, confronting the first mass-tort case of its size and kind, carefully analyzed the appropriateness of class treatment, and took steps to ensure that the class received the most effective class notice practicable. Chief Judge Weinstein believed the plaintiffs' claims had essentially no prospect for success—a judgment confirmed in subsequent litigation—yet he engaged in extraordinary efforts that produced a settlement that paid almost $200 million for the benefit of the class, which he, with a special master, then personally allocated so as to assist both ill and asymptomatic class members.

Respondents contend that absent class members may *always* collaterally attack a class judgment by contending they were situated differently from others in the class and therefore did not receive adequate representation, and they assume that such an attack is de novo review by the second set of courts. Then, abandoning the Second Circuit's distinction between class members who manifested illness before and after December 31, 1994, they argue that *all* asymptomatic class members were inadequately represented in this

case. Respondents candidly acknowledge that on their view a determination of adequacy can *never* be final as against absent class members.

I. ONCE ADEQUACY OF CLASS REPRESENTATION HAS BEEN LITIGATED AND RESOLVED, ABSENT CLASS MEMBERS ARE NOT ENTITLED TO RELITIGATE ADEQUACY DE NOVO.

Respondents argue at length (Br. 22-34) that if the Agent Orange class certification were litigated from scratch today, certification would be refused, at least insofar as the class included any then-unimpaired veterans. But that contention is beside the point, for two independent reasons.

A. Determinations Of Adequacy, Made In Accordance With Fundamentally Fair Procedures Such As Those In Rule 23, Are Not Subject To Collateral Attack.

As we have shown, a determination of adequacy reached in accordance with constitutionally adequate and fundamentally fair procedures is not subject to collateral attack, because the absent parties necessarily received all the process that was due. See Pet. Br. 25-41. Respondents and their *amici* have little to say in response to this showing.

First, they cite various authorities (Br. 17) for the proposition that "'the court conducting the action cannot predetermine the *res judicata* effect of the judgment.'" But the question here is not whether Chief Judge Weinstein could, in 1984, "predetermine" the *res judicata* consequences of his court's judgment; it is whether that court's judgment, long ago affirmed and final, *is res judicata*. We have never suggested that courts lack the authority to examine that question in the present case; our argument is that, if acceptable procedures were followed in 1984, the answer must be "yes."

Second, respondents' law professor amici assert principally (Br. 8) that this case is (and *Hansberry* was) "a case about the constitutional limits of legitimate jurisdiction." But

the professors acknowledge that "Justice Stone did not use the word jurisdiction in describing the Court's holding in *Hansberry*" (*id.*). In fact, the outcome in *Hansberry* ultimately turned not on personal jurisdiction, but on the lack of any procedural protections for the persons assertedly represented by the plaintiff in the original litigation and on the fact that the original judgment did not even purport to bind any defendant other than the individuals named. See 311 U.S. at 42-43, 45-46. *Hansberry* did not say that a later court can second-guess a determination of adequacy. Moreover, absent extraordinary circumstances, determinations of jurisdiction *are* given *res judicata* effect. See PLAC *Amicus* Br. at 16-18 (citing authorities).

The law professors seize upon *Hansberry*'s statement that it is a "familiar doctrine of the federal courts" that absent parties may be bound "'where they are in fact adequately represented by parties who are present.'" Law Profs. Br. 10 (quoting 311 U.S. at 43). But this background statement of positive law did not mean that adequacy, once determined, is open to endless relitigation. On the contrary, the Court immediately added that a State could "constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the *procedures* were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." 311 U.S. at 43 (emphasis added). The plain import of this language, and of the discussion and analysis throughout *Hansberry*, was that the focus in collateral proceedings must be on the efficacy of the previous *procedures* to ensure adequate representation.

Third, respondents and the law professors cite *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), for their argument that the absent class members are entitled to a later, de novo consideration of adequacy. But *Shutts* arose on direct review and said nothing about collateral attack on a final (and consummated) judgment or settlement. In particular,

"nowhere in *Shutts* did the Court state or imply that where the certifying court makes a determination of the adequacy of representation in accord with *Shutts*, this determination is subject to collateral attack." *Epstein* v. *MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999).[1] On the contrary, as we explained in our opening brief (Br. 29-30), to the extent that *Shutts* is relevant to the questions presented here, it strongly suggests that procedures like those embodied in Rule 23 afford absent class members the necessary due process.

Fourth, respondents and their law professor *amici* assert that, until the Ninth Circuit's decision in *Epstein*, it had been "universally accepted" that "any absentee (nonparticipating) class member who was purportedly bound by any class action settlement could maintain suit on the underlying claims in a new action provided that she could show that she had not been adequately represented in the original action." Law Profs. Br. 4, 6; Resp. Br. 17-19, 36. That is not the case. Indeed, the article that the law professors describe (Br. 6 n.7) as providing "an excellent overview of this area of law" reports that "[a] series of recent decisions has ignored, and even rejected, the rule that absent class members who have been inadequately represented have a right to collaterally attack the class judgment." Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 385-86 (2000) (citing decisions from the Third, Sixth, Ninth, and District of Columbia Circuits). Moreover, as we showed in our petition, both the First and Third Circuits held before *Epstein* that absent class members could not relitigate adequacy on collateral review when the certifying court had employed fair procedures in the original class action. See Pet. 9, 13-14 (citing *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), and *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994)).

[1] The law professors place great emphasis on the statement in *Shutts* that absent class members may "sit back and allow the litigation to run its course." Law Profs. Br. 15 (quoting 472 U.S. at 810). But the Court's point was that they may sit back precisely because the trial court has an unremitting obligation to monitor the adequacy of class counsel and look out for the interests of class members—not because class members can always litigate the issue from scratch later. *Shutts* emphasized that "there are safeguards provided for [the absent class member's] protection"—those safeguards being, as the Court explained, the procedural assurances offered by Rule 23 and its state-law counterparts. 472 U.S. at 809-810. Respondents' and their *amici*'s position creates perverse incentives against participation in direct proceedings, see *infra* at 20.

In our opening brief, we explained that implementation of Rule 23 procedures offers adequate assurance that the absent parties' interests were taken into account in the determination of adequacy; that procedural due process jurisprudence in all other contexts is directed at the procedures used in the generality of cases, rather than at the outcome in a particular case; that the private and societal interests that are elements of the due process equation dictate rejection of de novo relitigation of adequacy; and that disturbing the finality of the class judgment would impair *petitioners'* due process rights. Respondents and their *amici* make no response at all to these points.

The closest they come is the law professors' assertion that the "open-ended balancing test outlined in *Mathews* v. *Eldridge*" is "not the appropriate test for procedural questions that this Court has traditionally analyzed through more directly relevant precedents," and that "adequacy is the linchpin of the constitutional exercise of jurisdiction." Law Profs. Br. 19 (citing *Dusenbery* v. *United States*, 122 S. Ct. 694, 699 (2002)). But the importance of the adequacy question does not mean that a prior determination should be *relitigated* de novo. And while the Court does not apply *Mathews* in all circumstances, the case cited by the law professors *also* rejects any bright-line rule, identifying the requirement of due process as "reasonableness under the circumstances." *Dusenbery*, 122 S. Ct. at 699. Indeed, the Court engaged in precisely the same weighing of interests in *Shutts*, holding that, "[b]ecause States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass

suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." 472 U.S. at 811. Under this analysis, as we have previously argued (Br. 42-43), the competing interests at stake here preclude de novo relitigation of adequacy, as long as the procedures followed in the Agent Orange class action were designed "to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Hansberry*, 311 U.S. at 43.

Rule 23 provides such procedures. As respondents concede (Br. 32 n.36), Rule 23 charges certifying courts with making findings and managing class actions in ways that satisfy due process requirements. Compare, *e.g.*, Fed. R. Civ. P. 23(a)(4) & (c)(2) with *Shutts*, 472 U.S. at 812.[2] These protections were designed specifically "to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 547 (1974); Pet. Br. 27 (citing authorities). The machinery of Rule 23 itself thus ensures that the class will receive the "process" that is "due" under the Constitution. To hold otherwise would mean that class actions could not function as the rules contemplate because no amount of conscientious compliance would prevent class members from later escaping the class judgment by finding a friendlier court.[3]

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[2] Respondents contend (Br. 19) that the forward-looking nature of a Rule 23(a)(4) finding "dictates" that absent class members must be permitted to relitigate adequacy of representation in a second action. But as respondents later concede, a certifying court has a duty to monitor adequacy throughout the class-action litigation. See *id.* at 33. The fact that the initial determination of adequacy is not the only determination does not mean that the final judgment is subject to reopening.

[3] The 1966 amendments were specifically designed to eliminate this sort of one-sidedness, which had been a feature of the so-called "spurious" class action. See *American Pipe*, 414 U.S. at 547; PLAC *Amicus* Br. 7-10. This Court has recognized that it is "unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *American Pipe*, 414 U.S. at 547.

B. If Collateral Challenges To Adequacy Of Representation Are Permissible, The Question Must Be Whether The Original Determination Was Fundamentally Unfair Under The Circumstances Then Prevailing.

Our opening brief showed that if respondents *are* permitted to collaterally attack the adequacy determination, the proper inquiry is not whether the present court would reach a different conclusion today, but whether the initial determination was so prejudicial to absent class members that it cannot be allowed to stand, even in light of the reliance interests of the parties and society. We also showed that such an attack must be resolved in accordance with the law and facts as they existed at the time of the initial judgment. Respondents and their *amici* offer virtually no answer to these points.

1. Our opening brief explained why the showings necessary to establish inadequate representation must differ in direct and collateral proceedings. The balance of interests—of the considerations regarded as determinative in decisions like *Mathews* and *Dusenbery*—is decisively different. In collateral proceedings, there has by definition *been* a complete prior process, and there is no reason to presume that the second-round courts will get a better answer to the same question. In collateral proceedings, both the parties and society may have strong interests in the finality of a prior determination on which they have relied. The Court's decisions in the closely analogous habeas context, where a mechanism *is* available for advancing collateral challenges to constitutional errors in criminal proceedings, impose a test similar to that we suggest here: that the prior decision is not merely wrong, in the view of the later court, but so fundamentally defective that it cannot now be allowed to stand. See Pet. Br. 42-44.

Respondents and their *amici* have literally nothing to say about most of this. Indeed, although respondents assert (Br. 38-41) that they satisfy the higher standard applicable to collateral attacks—a point we address below—they nowhere explain why such a higher test should not apply.[4]

Respondents and their *amici* do suggest that the habeas analogy is inapt because criminal defendants control the initial litigation that gave rise to the challenged judgment. But the Court's jurisprudence recognizes that "there are significant and compelling parallels" between the application of finality principles in the criminal and civil contexts, and that finality concerns "'should not have *as much* place in criminal as in civil litigation.'" *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion) (emphasis in original). See also *Brecht* v. *Abrahamson*, 507 U.S. 619, 638-39 (1993); *Bousley* v. *United States*, 523 U.S. 614, 621 (1998) (per curiam); Pet. Br. 48; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 S. Ct. Rev. 337, 373 (1999) (allowing absent class members broad rights of collateral attack would perversely give them greater ability to challenge final judgments than capital defendants).

2. In our opening brief we also argued (Br. 49-50) that, if a collateral challenge is allowed in this case, it should not be governed by the rule stated in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), which discourages the combination of ill and asymptomatic plaintiffs in a single class. First, *Amchem* and *Ortiz*, which arose on direct review, did not announce due process rules at all and therefore do not govern respondents' due process challenge to the binding effect of the settlement. Moreover, *Amchem* effectively stated a new

[4] Under the de novo review standard respondents propose, the original district court's adequacy determination would actually get *less* deference on collateral review than on direct appeal, where it is reviewed for abuse of discretion. See 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1765, at 271-273 (2d ed. 2002).

rule on this point, and new rules may not govern in collateral proceedings. Respondents do not take issue with the proposition that principles of finality bar the application of newly articulated legal standards in collateral attacks on earlier final judgments. Their argument (Br. 30-32) is confined to the assertion that *Amchem* did not state a new rule.

It is *respondents*' burden, however, to demonstrate that "reasonable jurists" "'would have felt compelled by existing precedent'" to rule in *their* favor (*i.e.*, to have held class representation inadequate) in 1983 and 1984. *Graham* v. *Collins*, 506 U.S. 461, 467 (1993). See Pet. Br. 49 n.13. It is not sufficient for them to observe that "neither *Amchem* nor *Ortiz* explicitly or even implicitly overrules any precedent of this Court." Law Profs. Br. 27 (footnote omitted). *Amchem* plainly did state a "new rule" in this sense by requiring outcomes that had not been required by pre-existing precedent. *Amchem* itself noted that the lower courts had been divided on matters relating to "court surveillance under Rule 23's certification criteria" (521 U.S. at 618), and *Ortiz* subsequently explained that it is obvious only "*after Amchem* that a class divided between holders of present and future claims * * * requires division into homogeneous subclasses." 527 U.S. at 856 (emphasis added). The Second Circuit agreed, labeling *Amchem* and *Ortiz* "landmark" decisions; indeed, the holding below was driven by the court of appeals' belief that it had to "determine the effect" of those holdings "on a previously settled class action." Pet. App. 1a-2a; accord *Epstein*, 179 F.3d at 651 (Thomas, J., dissenting) (*Amchem* "heralded a new era of judicial scrutiny of class action certification and settlement").

Existing precedent at the time of the Agent Orange class action did *not* require exclusion of future claimants. The use of class actions to address mass exposure torts was in its infancy in the early 1980's, and in many ways the Agent Orange litigation was the first of its type. Indeed, Chief Judge Weinstein literally wrote the book on how courts should address mass tort claims (J. Weinstein, INDIVIDUAL JUSTICE IN

MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES (1995)), and this Court cited his analysis with approval in *Amchem*. See 521 U.S. at 618. Moreover, at the time of the Agent Orange litigation, certification of classes including present and future claimants *had* been found proper.[5] Existing precedent simply did not compel the outcome respondents advocate today.[6]

II. RESPONDENTS ARE BOUND BY THE ADEQUACY DETERMINATION MADE IN THE AGENT ORANGE CLASS ACTION.

In the Agent Orange class action, Judge Pratt, Judge Weinstein, and the Second Circuit carefully implemented the Rule 23 procedures and took extraordinary measures to ensure that the interests of all class members, including asymptomatic members like respondents, were fairly and adequately protected by the class representatives. Respondents' attempt to compare this case—with its more than 60 opinions, see *Ryan* v. *Dow Chemical Co.*, 781 F. Supp. 902, 904-07 (E.D.N.Y. 1991) (listing opinions)—to the kind of lightly

[5] See *National Ass'n of Radiation Survivors* v. *Walters*, 111 F.R.D. 595, 597 (N.D. Cal. 1986) (class of all past, present, and future claimants for disability stemming from exposure to atomic bomb tests); *In Re Three Mile Island Litigation*, 87 F.R.D. 433, 442 (M.D. Pa. 1980) (class for medical monitoring claims of all persons within 25-mile radius of Three Mile Island, including both ill and asymptomatic persons).

[6] Respondents cite (Br. 30 n.33) a 1983 district court decision to support the proposition that future and present claimants may not be in the same class. But the class in that case was decertified not because of potential conflict, but because intervening changes in state law meant that common questions no longer predominated. Respondents cite (Br. 30 n.34) a Seventh Circuit decision for the proposition that *Amchem* and *Ortiz* "are not exactly novelties." But that case cited *Ortiz* only to note that class members are ordinarily entitled to opt-out; it did not cite *Amchem* at all, nor did it speak to the present-futures conflict issue. The other decisions cited by respondents do not involve the present-future claimants problem confronted in *Amchem* and *Ortiz*.

publicized, quickly concluded, collusive bargain generally feared by policy makers is utterly misplaced.

A. The Courts Carefully Implemented The Rule 23 Procedures.

1. Respondents assert repeatedly that at the time of certification the class was not understood to include asymptomatic veterans. This is just wrong: all participants in the litigation, including the special masters and judges, understood that the class would include all veterans who had been exposed to Agent Orange. The plaintiffs' central theory of liability was that anyone who had been exposed to even a molecule of Agent Orange had suffered compensable "injury," whether or not he or she had developed symptoms. See, *e.g.*, *Ivy/Hartman*, 996 F.2d at 1433 ("From the very outset of the litigation in *Agent Orange I*, the plaintiffs adopted this [exposure as "injury"] meaning and urged it repeatedly upon the district court.").[7] Judges Pratt and

[7] See also Mem. of Law in Supp. of Defs.' Mot. Under Rules 12(b) and 12(f), at 13-14, No. 79 C 1195 (E.D.N.Y. Sept. 14, 1979) (moving to strike claims made on behalf of persons assertedly "at risk" of illness due to Agent Orange exposure); JA 48, 61-62 (lead plaintiffs' counsel espousing "one hit" theory of causation that all exposed veterans suffered some form of personal injury); 506 F. Supp. 762, 791 (E.D.N.Y. 1980) (discussing best practicable notice to "the over two million Vietnam Veterans and their families who are included in the class"); Pls.' Reply to Defs.' Objections and Modifications Regarding Class Action Certif. and Notice at 3-4, MDL No. 381 (E.D.N.Y. Jan. 26, 1981) ("The Court's description of the class does not require any further refinement at this time. * * * The class for purposes of the trial of the government contract defense issue is the entire class of 2.5 million Vietnam Veterans and their families."); Tr. of Hearing before Special Master at 1672, MDL No. 381 (E.D.N.Y. Sept. 2, 1982) (statement by lead plaintiffs' counsel that he represented the "2,456,000 men who went to Vietnam who were exposed to Dioxin contaminated Phenoxy herbicides. That is the class"); Defs.' Reply Mem. in Opp'n to Class Certif. at 7, MDL No. 381 (E.D.N.Y. Jan. 15, 1983) (acknowledging that plaintiffs sought to "represent the interests of a class of over 2.4 million Vietnam veterans"); Pet. for Writ of Cert. at 2 (No. 80-1882), filed Apr. 29, 1981 (asserting that "[t]he plaintiffs are the class of all those United States veterans who served in Southeast Asia during the

Weinstein expressly and repeatedly recognized that point prior to certification. See, *e.g.*, 506 F. Supp. at 787 ("plaintiffs have moved for a conditional order pursuant to F.R.C.P. 23 permitting the suit to proceed as a class action on behalf of all persons exposed to Agent Orange and various members of their families"); Tr. of Oral Arg. at 46, MDL No. 381 (E.D.N.Y. Nov. 7, 1983) (Weinstein, C.J.: "Anybody in Vietnam during this period is prospectively with the class"). Respondents' assertion (Br. 40) that the class was "expanded to include futures" at the time of settlement is incorrect. When the class definition and notice referred to veterans "injured" in Vietnam by exposure to Agent Orange (see Pet. Br. 5), participants knew this meant all veterans.

2. Contrary to respondents' assertion that no procedures were followed to assure adequacy of representation and notice, these matters were raised repeatedly, and Judges Pratt and Weinstein, as well as the Second Circuit, were fully aware of the requirements of Rule 23 as they resolved them. These matters were argued and briefed, both in the district court and in the court of appeals, and both in general[8] and with particular reference to the "futures".[9]

'Viet Nam War' and were exposed to chemical defoliants"). A reference by Judge Weinstein to the "potential size" of the class as "tens of thousands," 100 F.R.D. at 720, relates, in context, to the number of claimants with already-manifested disease whose individual suits would, absent certification, immediately clog the courts.

[8] *E.g.*, Dow Mem. in Opp. to Certif. of Class Action at 13, No. 79 C 1195 (E.D.N.Y. Sept. 26, 1979) (arguing that interests of named parties might be antagonistic to interests of class); Tr. of Hearing before Judge Pratt, at 85-86, MDL No. 381 (E.D.N.Y. Jan. 31, 1981) (def. attorney raising adequacy of representation concerns); Defs.' Supp. Mem. in Opp. to Class Certif., MDL No. 381, at 10-11 (E.D.N.Y. Nov. 17, 1982) (arguing for mail notification to each of 2.4 million Vietnam veterans); Defs.' Reply Mem. in Opp. to Class Certif., MDL No. 381, at 5 (E.D.N.Y. Jan. 15, 1983) (same).

[9] See Mot. to Certify a Subclass Whose Members Object to the Terms of Settlement and to Appoint Counsel for that Subclass at 11-12, MDL No. 381 (July 5, 1984) (arguing that notice was insufficient as to

Precisely because this was not a collusive suit, the judges were *forced* to focus on compliance with Rule 23's requirements: the defendants consistently opposed certification and vigorously litigated the matter. In nevertheless determining to certify the class, Judge Pratt expressly indicated awareness of his obligation to assure adequate class representation. See 506 F. Supp. at 788. The point was reiterated by Chief Judge Weinstein when he assumed responsibility for the case and (again over the defendants' objections) confirmed the certification decision. See 100 F.R.D. at 720-721.[10] As Chief Judge Weinstein subsequently explained, "[a]ll of the courts which considered the Agent Orange Settlement were fully cognizant of the conflict arguments now hypothesized by the plaintiffs" and determined that they did not preclude class certification. 781 F. Supp. at 919. The court of appeals agreed that class representation was ade-

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asymptomatic veterans and calling for briefing on "whether the present class representatives, who have manifested injury and claimed injury," adequately represented them); Objection of William P. Stimson to Proposed Settlement of Class Action (JA 124) (arguing that notice was inadequate as to futures); Mem. in Supp. of Pls.' Mot. Pursuant to Rules 52(b) and 59(e), at 155-158, 174, 184-200, MDL No. 381 (E.D.N.Y. Mar. 7, 1985) (arguing that futures received inadequate notice and representation); Master Br. of Appellants at 42-44, 53-55 & n.43, No. 84-6273 (2d Cir. Jan. 13, 1986) (arguing before court of appeals that futures received inadequate notice and were inadequately represented); Reply Br. of Appellants (Reply to PMC's Br.) at 2, 11-16, No. 84-6273 (2d Cir. Mar. 27, 1986) (repeating arguments that futures received inadequate notice and representation).

[10] Respondents argue (Br. 28, 32) that (i) the district court could not properly determine adequacy under Rule 23(a)(4) because class representatives had not been identified and (ii) it was unfair to them that the representatives finally selected included no asymptomatic persons. But Rule 23 expressly permits conditional determinations before representatives are selected (see 1966 Amend. advisory comm. note), and in this case the ultimate selection was consciously designed to *help* respondents: Judge Weinstein expressly required representatives who would exemplify the claimed illnesses to the jury, 100 F.R.D. at 723, and the representatives had no role in allocating the settlement amount.

quate and upheld certification, rejecting (818 F.2d at 166-167) allegations of intraclass conflicts identical to the allegations made in the current round of litigation.

Chief Judge Weinstein also made extraordinary efforts to satisfy his obligation under Rule 23(e) to assure the fairness of the class settlement. He required that notice of the settlement be provided (1) by mail to all known class members and (2) generally by publication. He then held eleven days of fairness hearings in five cities, where he heard from almost 500 witnesses. See Pet. Br. 7-8. He noted: "We have a number of people who have testified at these hearings who say we don't have an injury now, but we are concerned about the future." Tr. of Hearing (Aug. 10, 1984) (JA 129). He ultimately approved the fairness of the settlement in an opinion that ran more than 100 pages in the Federal Supplement. See 597 F. Supp. at 746-858.

3. Respondents contend (Br. 22-27) that the class notice was inadequate because (1) asymptomatic veterans who received the notice would not have recognized themselves as having been "injured" by Agent Orange; and (2) notice to "futures" claimants is never constitutionally permissible. These contentions were expressly left unresolved by the court of appeals (which had affirmed the adequacy of the class notice in *Agent Orange I* but evidently believed that the matter had been cast in doubt by *Amchem* (see Pet. App. 19a n.8)), and they are outside the scope of the questions presented in the petition for certiorari. But Chief Judge Weinstein, of course, was familiar with the obligation to provide adequate class notice. Rejecting *petitioners'* argument that all class members should receive individualized notice, he implemented an elaborate regime for notifying class members that he regarded as "the best reasonable and practicable notice under the circumstances of this litigation." 100 F.R.D. at 731.[11] Chief Judge Weinstein's notification procedure was

[11] The notice was extensively distributed and, by all appearances, effective. Chief Judge Weinstein required that letter notice be sent to the more than 100,000 class members who could be readily identified. See 818 F.2d at 167, 169. That was supplemented by extensive broadcast and print announcements in general, armed forces and veterans' media, and requests that state governors have their state's veterans' agencies directly notify all ascertainable class members. See Pet. Br. 6-7.

upheld by the Second Circuit, which determined that the method of notification used an "approach appropriate to this unique case" and "was fully adequate under the circumstances." 818 F.2d at 167, 169.

Respondents contend nonetheless that asymptomatic veterans who received the class certification notice would not have understood themselves to be members of the class. The contemporary understanding of the judges and parties (who recognized the scope of the class and crafted and reviewed the notice) calls this contention into question; so too do news stories published widely before the settlement was announced that indicated that the class action was being maintained on behalf of all Vietnam veterans who may have been exposed to Agent Orange.[12] Indeed, in upholding the ade-

[12] See, *e.g.*, *U.S. Kept As Defendant in Agent Orange Suit*, New York Times, Dec. 20, 1983 ("The suit is a class action brought in the name of all veterans in American, Australian and New Zealand forces who served in Vietnam from 1961 to 1972. All will be bound by the outcome except those who request exclusion."); *New Complications in Agent Orange Trial*, New York Times, Jan. 1, 1984 (the suit includes veterans who are currently ill as well as those "who may come forward in the future to claim injury"); *Papers Released in Agent Orange Case*, St. Louis Globe-Democrat, May 1, 1982 ("[T]he suit covers all 2.5 million veterans of the war."); *Veterans Charge Product Liability*, Indianapolis News, Sept. 1, 1981 ("According to Victor Yannacone, who is spearheading the veterans' case, the class includes 'all the vets who served in Vietnam (about 2.4 million) - together with their families, who are suffering the ill effects or who may suffer the ill effects of their exposure to the toxic synthetic organic chemicals such as those in Agent Orange.'"); *Agent Orange Battle Continues in Courtrooms Across Country*, Vineland (N.J.) Times J., Mar. 12, 1981 ("2.48 million Vietnam veterans and their families"); *Local Man Recalls Agent Orange*, Houma (La.) Courier, Feb. 1, 1981 ("2.48 million Vietnam veterans and their families"); *Business Week*, Mar. 24, 1980 ("the 2.4 million veterans who might have been exposed to Agent Orange"); see also William R. Corson, *The Vietnam*

quacy of the class notice, the Second Circuit took "judicial notice of the widespread publicity this litigation has received." *Id.* at 169. As the court of appeals recognized, *id.*, "[g]iven the great doubt as to whether anyone at all was injured by Agent Orange, the fact that some 240,000 claims have been filed suggests that no practical problem exists as to the adequacy of the notice." If there is any doubt on this score, and if the Court regards the issue as relevant to the disposition of the case, the matter should be remanded to the district court so that the record may be perfected on matters including, for example, efforts of veterans groups to notify affected class members, publicity regarding the case, and recipients' understanding of the class notice.

B. Respondents Have Not Made The Showing Of Basic Unfairness Necessary To Reopen The Finding Of Adequate Representation.

In an effort to show basic unfairness sufficient to justify disturbing the final judgment in the Agent Orange class action, respondents argue (Br. 39-40) that (1) they had no reason "to liquidate their claims" at a time when they were asymptomatic and (2) petitioners are somehow responsible for the inadequacy of class representation. These arguments are insubstantial.

1. There was no prejudicial conflict within the class. When the Agent Orange class action was brought, both ill and asymptomatic class members had one overriding interest in common: to establish liability and extract the largest possible judgment from petitioners. Moreover, as Judge Pratt, Chief Judge Weinstein and the Second Circuit all recognized, both ill and asymptomatic class members faced the same overwhelming obstacles: lack of evidence of causation and a government contractor defense, both of which made any recovery highly unlikely. See 818 F.2d at 166-167; 611 F.

Veterans Adviser, Penthouse (Apr. 1984) ("all veterans of the United States, Australia and New Zealand who served in Vietnam").

Supp. at 1263. For all that appeared in 1984, Agent Orange claims were wholly unpromising, and the claims of opt-outs were in fact later dismissed on the merits by Chief Judge Weinstein, who was affirmed by the Second Circuit. Nevertheless, both ill and asymptomatic class members did achieve an important benefit: a $200 million settlement that benefited both.

Respondents now argue that they would have chosen to forgo the benefits of class membership, but this argument depends entirely on hindsight. Respondents did not know in 1984 that they would fall ill after the 10-year coverage period, and there was no assurance, or even likelihood, that the scientific[13] or legal[14] underpinnings of their claims would grow stronger over the years. To the contrary, as Chief Judge Weinstein explained, it appeared that claims brought in the future would be *weaker* in significant respects because, as

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[13] For example, an epidemiological study of 1,149 Vietnam veterans most heavily exposed (the so-called Ranch Hand veterans who applied Agent Orange) has tracked 266 possible health effects over 20 years but has not identified *any* health effects caused by Agent Orange. Epidemiologic Investigation of Health Effects in Air Force Personnel Following Exposure To Herbicides, Vol I: 1997 Follow-up Examination Results, Final Report May 1997-Feb. 2000, NTIS No. ADA408237, Executive Summary. And the Institute of Medicine reports to which respondents now point as "establishing" causation (Br. at 13), merely categorize diseases for determination of veteran benefits "based on 'statistical association,' *not on causality*," and emphatically do *not* apply "standard criteria used in epidemiology for assessing causality." See Institute of Medicine, Veterans and Agent Orange: Update 2000 at 6 (emphasis added).

[14] The military contractor defense still presents a forbidding threshold barrier. Respondents' assertion (Br. 10 n.14) that Chief Judge Weinstein "reevaluated his position" in a subsequent decision is incorrect. The decision says only that the set of defendants who may invoke the federal officer removal statute is smaller than the set who may invoke the military contractor defense. *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 934, 945 (E.D.N.Y. 1992). The Fifth Circuit recently recognized the continuing applicability of the military contractor defense to Agent Orange claims. See *Miller* v. *Diamond Shamrock Co.*, 275 F.3d 414, 421-22 (5th Cir. 2001).

time went by, illness would "have a relatively diminished connection with Agent Orange exposure in terms of both public perception and the likelihood of intervening or contributing causes." 611 F. Supp. at 1418.

The principal source of intraclass conflict identified by respondents and the court below—tension over the allocation of settlement proceeds between ill and asymptomatic claimants—did not stem from any feature of class representation. Quite the contrary: the settlement negotiated by class counsel simply provided an undifferentiated lump sum for the benefit of the class as a whole, along with the proviso that unspecified portions of the settlement would go both to currently disabled veterans and to those who became disabled in the future; the precise allocation of funds and the nature of the eligibility rules were left open. See Pet. Br. 7, 9-11; JA 111-113. The judgment was entered on condition that the *court*, with a clear understanding of its fiduciary obligations to those not present, would resolve the distributional issues. And as we explained in our opening brief, no conflict over the distribution of the settlement funds ever arose because Chief Judge Weinstein, after enormous effort and with the help of a special master, developed his *own* allocation plan—after issuing an additional notice, holding an additional hearing, and considering not only all plans submitted by the litigants, but also plans and suggestions from veterans' groups and interested individuals. *Agent Orange I*, 818 F.2d at 157-158; see Pet. Br. 45. Respondents' complaint, therefore, is not with anything done by their representatives, but with a plan devised by a judge who unquestionably was acting as a fiduciary for the entire class.

2. The further suggestion that petitioners are somehow to blame for respondents' current dissatisfaction with the settlement is meritless. Petitioners consistently *opposed* class certification; they sought the provision of personal letter notice to the class members; they were prepared to litigate the case and settled literally on the morning of trial—under great pressure from the trial judge—only after engaging in

negotiations that were arms-length, contentious, "even fierce" (*Ivy/Hartman*, 996 F.2d at 1436); they had nothing to do with development of the settlement allocation formula. There was nothing the least bit collusive about this settlement. Compare *Amchem*, 521 U.S. at 620.

The inequitable impact on petitioners of reopening the class judgment is manifest. Petitioners believed the class claims to be groundless. When nevertheless faced with a certified class, and pressed by the judge to settle, they did so only because they understood that all members of the class would be bound by the judgment. They then paid a substantial sum, much of which went to benefit then-asymptomatic plaintiffs in the form of direct payments to those who became ill prior to 1995 and indirect assistance to all class members through the Class Assistance Program. Yet now that the funds have been disbursed, petitioners find themselves facing renewed litigation and possible additional liability. The Due Process Clause should not bring about such a result.[15]

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[15] Respondents are incorrect to argue (Br. 35-36) that they cannot be bound by the settlement because, since they were not ill in 1984, they lacked Article III standing to be included in the class. Only named class representatives need establish individual standing; unnamed class members need not individually satisfy standing requirements. See 1 H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 2:5 (4th ed. 2002). cf. *Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975). In any event, state and federal courts (and in particular bankruptcy courts) routinely resolve future, unaccrued tort claims. See *Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988) (confirming plan of reorganization resolving both present and future-arising asbestos-related injury claims); *In re UNR Indus., Inc.*, 20 F.3d 766, 770 (7th Cir. 1994) ("treating as 'creditors' persons whose injuries are not yet manifest" comports with Art. III standing because "the injury is real enough" even if "the identity of the victims remains to be ascertained"); 11 U.S.C. § 524(g) (expressly approving the creation of trusts, in bankruptcy, on the model of *Johns-Manville* and *UNR*, to address current and future-arising claims for asbestos-related injury); see also *Grady* v. *A.H. Robins Co.*, 839 F.2d 198, 203 (4th Cir.) (holding, in bankruptcy of the manufacturer of the Dalkon Shield, that a creditor holds "claim" in bankruptcy, to be resolved in bankruptcy court, if "the acts constituting the tort or breach of warranty have occurred prior to the fil-

The decision below would create perverse and unfair incentives for absent class members. In all cases, they could avoid the effort and risk of asserting their rights, enjoy the benefits of any favorable judgment or settlement, and mount a de novo collateral attack in a chosen new forum whenever they believe circumstances later warrant. The rule announced below would curtail both the fairness and the usefulness of the class action, and it would discourage settlements because defendants would remain at risk of later second-round liability. It is important that this Court reaffirm the principle that determinations of adequacy of representation, reached in proceedings that afford due process, *are* binding on all class members.

CONCLUSION

The decision of the Second Circuit should be reversed.

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ing of the petition," even if the injury is not yet manifest), cert. dismissed, 487 U.S. 1260 (1988). Persons holding such claims have a currently cognizable interest in an action intended to obtain a fund from which they can ultimately obtain compensation. For that reason, class action settlements routinely include releases waiving future claims. See *Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268, 1287 (9th Cir.1992) (weight of authority holds that federal court may release not only those claims alleged in the complaint, but also claim "based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action") (quoting *TBK Partners, Ltd.* v. *Western Union Corp.*, 675 F.2d 456, 460 (2d Cir.1982)); *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991) (a "court can approve and enforce a settlement which requires a party to release claims actually brought, or potentially 'bringable'").

Respectfully submitted,

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IN THE
Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae addresses the following issue:

Whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members had a full opportunity to opt out, object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICUS CURIAE*

The Washington Legal Foundation is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation.

In particular, WLF has appeared before this Court as well as other federal and State courts in cases touching upon the *res judicata* effect of class action litigation. *See, e.g., Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999).

WLF is concerned that the decision below, if allowed to stand, will throw into question the finality of class action settlements and thus discourage litigants from entering into such settlements. Moreover, WLF believes that the decision below is terribly unfair to defendants in certified class actions; the decision threatens to place many such defendants in a heads-I-win-tails-you-lose situation, in which they have nothing to gain and everything to lose by litigating class claims.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other that WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

WLF has no direct interest in the outcome of this lawsuit or any other suits raising similar issues. WLF is filing this brief with the consent of all parties. Copies of the consent letters have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement of the Case contained in the brief of Petitioners.

In brief, Petitioners Daniel Stephenson and Joe Isaacson are Vietnam War veterans who allege that they were injured by exposure to Agent Orange while serving in the military in Vietnam.[2] They filed separate lawsuits against the manufacturers of Agent Orange, alleging that their injuries were the result of the manufacturers' tortious conduct.

The issue before the Court is whether the claims of Stephenson and Isaacson are barred by a class action settlement entered into in 1984. The certified class in the prior suit included all United States military personnel "assigned to or near Vietnam at any time from 1961 to 1972, who alleged personal injury from exposure to" Agent Orange. Petition Appendix ("Pet. App.") 68a. The class, which was certified in 1983 over the vigorous objection of the defendant manufacturers, *id.* at 45a-76a, included both Stephenson and Isaacson – even though at the time they had not been diagnosed with the diseases that they attribute to

[2] Stephenson was diagnosed in February 1998 with multiple myeloma, a bone marrow cancer. In 1996, Isaacson was diagnosed with non-Hodgkins lymphoma. Both contend that their diseases were a direct result of their exposure to Agent Orange 30 years earlier.

their Agent Orange exposure. The settlement provided for payment of $180 million by the defendants into a settlement fund. Seventy-five percent of those funds were to be paid to survivors of deceased class members and to class members who became totally disabled before 1995 (10 years after the settlement), without regard to any demonstration that the class members had been injured by exposure to Agent Orange. The remaining 25% of the funds were to be used to establish a foundation for the benefit of all class members, to assist them in dealing with medical and related problems. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 151, 158 (2d Cir. 1987), *cert. denied*, 474 U.S. 1004 (1988).

Following extensive hearings, the district court approved the settlement as fair to all class members, an approval that was later affirmed by the Second Circuit. *Id.* at 163-74. Both the district court and the appeals court explicitly rejected challenges to adequacy of representation by plaintiffs' counsel and named plaintiffs. *Id.* at 167. While the settlement explicitly recognized that some class members qualified for immediate direct payments from the settlement fund (due to their disability or death) and other did not (and might never be entitled to such payments), the courts determined that the potential class conflicts created by such differences were not sufficient to call into question the adequacy of representation. *Id.* The appeals court agreed with the district court that there were no significant differences in the strength of the claims of the various class members (the court viewed all the claims as uniformly weak) and thus that it was fair and reasonable to base compensation on injuries actually suffered or to be suffered by 1994. *Id.*

In reliance on that approval, the Agent Orange manufacturers paid $180 million to settle the claims of all class members.[3]

The manufacturers' litigation peace did not last long. Within two years, two new tort actions were filed by Vietnam veterans who claimed injury due to Agent Orange exposure; they asserted that they did not discover their injuries until after the 1984 settlement was reached. They asserted, *inter alia*, that they had not been adequately represented in the prior action. The district court and appeals court rejected that assertion, finding that "the fundamental fairness of the *Agent Orange I* settlement remains unshaken" and that "[t]he representation in *Agent Orange I* was more than adequate to protect appellants' interests." *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied,* 510 U.S. 1140 (1994). The appeals court agreed with the district court that the conflict between those who had suffered injury by 1984 and those who had not was "nonexistent," because "[t]he relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before" 1994, when eligibility for compensation from the settlement fund was scheduled to end. *Id.* at 1436. The appeals court also found that all class members, even those without injury as of 1984, had received adequate notice of the class action. *Id.* at 1435.

The claims of Respondents Stephenson and Isaacson (filed in February 1999 and August 1998, respectively) were

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[3] A small number of individuals opted out of the class. Their claims were ultimately dismissed on summary judgment; the Second Circuit affirmed the dismissal on the basis that their claims were barred by the military contractor defense. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 187, 189 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

transferred to the U.S. District Court for the Eastern District of New York by the MDL Panel. Pet. App. 10a. In December 1999, the district court granted Petitioners' Rule 12(b)(6) motion to dismiss, finding that Respondents' claim that they were inadequately represented in the initial class action ("*Agent Orange I*") amounted to an impermissible collateral attack on the prior settlement. *Id.* 39a-41a.

In November 2001, the Second Circuit reversed and remanded the case to the district court for further proceedings. *Id.* 1a-20a. The court stated that its decision was mandated by this Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). *Id.* 2a. Although conceding that it had rejected challenges to adequacy of representation in both its 1985 and 1994 Agent Orange decisions, the appeals court noted that neither it nor the district court had ever explicitly held that there was adequate representation in *Agent Orange I* for those absent class members whose injuries were not manifested by 1984 *and* would not manifest themselves until after the depletion of settlement funds in 1994, 10 years later. *Id.* 13a. Citing *Hansberry v. Lee,* 311 U.S. 21 (1940), the appeals court held that permitting collateral attack on an adequacy of representation determination "is amply supported by precedent." *Id.* 14a. The court then concluded that Stephenson's and Isaacson's interests conflicted with those of the class representatives (based on the failure of the *Agent Orange I* settlement to provide for compensation for those whose injury manifested itself after 1994), and thus that *Amchem* and *Ortiz* required a finding that they were not adequately represented in *Agent Orange I*. *Id.* 19a. The court concluded that due process bars application of *res judicata* principals to absent class members who were not

adequately represented, and thus that Stephenson and Isaacson were not bound by the *Agent Orange I* settlement agreement. *Id.* 18a. The court also opined that the notice provided to Respondents may have been insufficient to bind them to the settlement, but it declined to decide that issue in light of its inadequacy of representation determination. *Id.* 19a n.8.

SUMMARY OF ARGUMENT

The Second Circuit permitted Respondents' claims to go forward despite their membership in a plaintiff class whose claims were settled in 1984. In the course of doing so, the court articulated an extremely generous standard for permitting collateral attacks on settled class actions. That standard draws no support from any of this Court's case law. To the contrary, the Court has repeatedly made clear that issues that have been fully and fairly litigated in a court of competent jurisdiction cannot be re-opened on collateral review. While due process mandates that an absent class member cannot be bound by any class action judgment in the absence of adequate representation, the adequacy of class representation is to be decided by the certifying court, and that decision is not to be second-guessed by other courts.

Many years after the trial court determined that the class plaintiffs could adequately represent the interests of the entire class, this Court's decisions in *Amchem* and *Ortiz* provided significant additional guidance to trial courts faced with adequacy of representation issues. It may be that if the trial court had had the benefit of those decisions in 1984, it would not have approved the class-wide settlement. But neither *Amchem* nor *Ortiz* speaks to the issue of collateral attacks on class action judgments; in the absence of any evidence that

the district court's 1984 approval of the settlement was procedural deficient, there can be no basis for overturning that decision on collateral review.

Moreover, the Second Circuit's decision places class action defendants at a decided procedural disadvantage. They face the prospect of paying large settlements or damage awards without any assurance that those payments will bring an end to litigation. At the very least, the Second Circuit's decision is likely to discourage settlements by defendants who are unwilling to commit significant sums to the settlement if there is a significant possibility that absent class members can avoid the *res judicata* bar by asserting inadequate representation or inadequate notice.

ARGUMENT

I. A CLASS ACTION SETTLEMENT APPROVED FOLLOWING CAREFUL CONSIDERATION OF ADEQUACY OF REPRESENTATION OF ALL CLASS MEMBERS PRECLUDES RELITIGATION OF THE ADEQUACY ISSUE

As the Second Circuit recognized, once a judgment has been entered in a class action, *res judicata* generally applies to bind absent class members to the judgment, except where to do so would violate due process. *Id.* 18a. One of the requirements of the Due Process Clause is that "the named plaintiff at all times adequately represents the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985). But the district court found in 1984 that the named plaintiffs adequately represented the interests of all absent class members in *Agent Orange I*; that finding was affirmed on appeal by the Second Circuit, and

was reiterated by both the district court and the Second Circuit in 1991-93. Under those circumstances, the district court quite properly applied *res judicata* to dismiss Respondents' claims.

The Second Circuit asserted that *res judicata* is never a bar to a collateral challenge to a finding that absent class members were adequately represented. *Id.* 14a. That remarkable assertion draws no support from this Court's case law. To the contrary, the case law makes clear that if the initial adequacy of representation finding was made by a court operating in a procedurally adequate manner, the finding is not subject to collateral attack. Any other rule of law would significantly undermine the finality of all class action judgments.

A. Absent Class Members Receive All the Process They Are Due When the Certifying Court Examines Whether Their Interests Are Adequately Represented

The Court's most comprehensive discussion of the due process rights of absent class members is set forth in *Shutts*. The Court held that due process demands that, if a court wishes to bind absent plaintiffs concerning "a claim for money damages or similar relief at law," the absent plaintiffs must be afforded the following protections:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* [*v. Central Hanover Bank & Trust Co.*], 339 U.S. [306,] 314-315 [1950]. . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Shutts, 472 U.S. at 812.

But nothing in *Shutts* suggests that absent class plaintiffs seeking to avoid being bound by a class action judgment may raise such due process concerns in a collateral attack on the judgment. *Shutts* itself was a direct appeal from a class action judgment entered by a Kansas court and thus had no occasion to discuss collateral challenges. More importantly, *Shutts*'s discussion the adequacy of representation issue makes clear that the Court contemplated that it was the duty of the *trial judge* to protect the rights of absent class plaintiffs, and that the adequacy issue was to be determined by that judge in connection with his class certification decision. *See, e.g., Shutts*, 472 U.S. at 809. That focus on the role of the trial judge as the champion of the rights of absent class plaintiffs is inconsistent with Respondents' assertion that they are always free to challenge the *res judicata* effect of a judgment arising from a proceeding in which neither they nor their surrogates directly participated.

The Court has repeatedly stressed the obligation of a court to uphold another court's judgments with respect to any

issue that has been fully and fairly litigated and finally decided. That obligation even extends to issues involving the first court's jurisdiction to decide the issue:

> This Court has long recognized that "[the] principles of res judicata apply to questions of jurisdiction as well as to other issues." *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932). *See also Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939); *Davis v. Davis*, 305 U.S. 32 (1938). Any doubt about this proposition was definitively laid to rest in *Durfee v. Duke*, [375 U.S. 106, 111 (1963)], where this Court held that "a judgment is entitled to full faith and credit -- even as to questions of jurisdiction -- when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." The North Carolina courts, therefore, should have determined in the first instance whether the Rehabilitation Court [the Indiana court whose judgment was being collaterally attacked] fully and fairly considered the question of subject matter jurisdiction over the North Carolina deposit, with respect to pre-rehabilitation claims of the parties before it. If the matter was fully considered and finally determined in the rehabilitation proceedings, the judgment was entitled to full faith and credit in the North Carolina courts.

Underwriters Nat'l Assurance Co. v. North Carolina Life and Accidental Health Ins. Gty. Ass'n, 455 U.S. 691, 706-07 (1982).

If a litigant is not entitled to collaterally challenge a judgment on the ground that the issuing court lacked subject

matter jurisdiction to render the judgment -- provided only that the rendering court has fully and fairly considered the jurisdictional issue -- then surely there can be no basis for allowing absent class plaintiffs to collaterally challenge a class action judgment on the basis of inadequacy of representation where the adequacy issue has been fully and fairly considered. Even if no litigant challenges adequacy of representation in connection with approval of a class action settlement (and there *were* such challenges in *Agent Orange I*), the trial court's independent obligation to examine the adequacy of representation issue before approving a settlement ensures that the interests of absent class members are treated fairly. That is all the process that is due to absent class members. *See also Matsushita Electric*, 516 U.S. at 374 ("[A] judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the [Full Faith and Credit] Act," 28 U.S.C. § 1738.).

Possibly in an effort to limit the scope of the collateral challenges it was sanctioning, the Second Circuit noted that neither it (in its prior decisions) nor the district court had ever stated explicitly that there was adequate representation for absent class members whose injuries were not manifested by 1984 *and* would not manifest themselves until after the depletion of settlement funds in 1994, 10 years later. Pet. App. 13a.[4] But there is no question that both courts

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[4] It is far from clear that the appeals court's decision was in any way dependent on the absence of a prior finding that *explicitly* referenced absent class members in Respondents' precise situation. The court never suggested that the presence of such a finding would have precluded collateral review of the adequacy determination. Indeed, the appeals court's ringing endorsement of collateral challenges to

(continued...)

considered the adequacy of representation issue at great length and ultimately determined -- on multiple occasions -- that *all* absent class members were adequately represented. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435-37 (2d Cir. 1993), *cert. denied,* 510 U.S. 1140 (1994). Given the evidence that both courts fully and fairly considered the issue and finally decided that all absent class members were adequately represented, the courts' failure also to state that every conceivable subclass of absent class plaintiffs was adequately represented is of no constitutional significance. Certainly, there can be no claim that the courts did not contemplate that *some* of the absent class members whose injuries had not become manifest as of 1984 might not develop any symptoms of their injuries until after 1994. For example, the Second Circuit in 1993 quoted the district court as recognizing that possibility but nonetheless finding no inadequacy of representation because even among those Vietnam veterans still in good health as of 1984, virtually all injuries attributable to Agent Orange exposure would have been manifested by 1994:

> In many cases the conflict between the interests of present and future claimants is more imagined than real. In the instant case, for example, the injustice wrought upon the plaintiffs is nonexistent. These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund. *The relevant latency period and the age of the veterans ensure that almost all valid claims will be revealed before that time.*

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[4](...continued)
adequacy of representation determinations, Pet. App. 14a, indicates that the court did not intend to limit its holding in this manner.

Id. at 1435-36 (quoting district court, 781 F. Supp. 902, 919 (E.D.N.Y. 1991)) (emphasis added).[5]

In support of its contention that absent class members are permitted to collaterally attack a class action judgment based on inadequacy of representation, the Second Circuit relied heavily on this Court's decision in *Hansberry*. Pet. App. 14a. That reliance was misplaced. *Hansberry* involved property owners who were appealing an Illinois Supreme Court determination that they were bound by a judgment rendered in an earlier litigation to which they were not parties, but which the Illinois court determined was a class action that bound a defendant class that included the property owners. The Court held that due process prohibited Illinois from binding the property owners in this manner. *Hansberry*, 311 U.S. at 119-20. But while the Court questioned both the adequacy of notice to the property owners and the adequacy of representation, the Court did not establish any generalized right to collateral challenge. To the contrary, the Court held, "[T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." *Id.* at

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[5] The quoted language illustrates the incorrectness of Respondents' repeated claim that absent class members in their position received little of value from the *Agent Orange I* settlement. Stephenson and Isaacson, like every other absent class member who had been exposed to Agent Orange but who had not manifested any symptoms of injury as of 1984, were in effect granted a 10-year insurance policy against death or disability. That Stephenson and Isaacson were lucky enough not to have suffered death or disability during 1984-1994 does not in any way diminish the value of that insurance.

118.[6] In other words, the Court limited collateral challenges to class action judgments to those cases in which the judgment was entered in a *procedurally* deficient manner. It did not sanction such challenges (as the Second Circuit apparently thought) whenever the absent class member believes she was inadequately represented or did not receive adequate notice.

The Court confirmed that limited reading of *Hansberry* in *Richards v. Jefferson County*, 517 U.S. 793 (1996). *Richards* involved a challenge to an occupational tax imposed by a county government; the government asserted that *res judicata* barred the challenge because an earlier challenge to the tax had been denied. Citing *Hansberry*, the Court held that the second challenge was not barred because none of the plaintiffs in the first suit was purporting to act on behalf of a class that included the plaintiffs in the second suit. *Richards*, 517 U.S. at 1767-68. Because a principal plaintiff in the first suit (the acting director of finance for the City of

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[6] The Court held that the initial Illinois proceeding failed to meet that due process standard because, *inter alia*: (1) the plaintiffs in the initial proceeding "did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind others"; and (2) there was some question whether the named defendants really had an interest in protecting their property rights against contractual interference: "even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity." *Id.* at 120. The facts in this case are not even remotely similar: there was never any question in this case that the named plaintiffs intended this case to proceed as a class action that would be binding on absent class members, and the district court certified the class and approved the settlement only after satisfying itself that the named plaintiffs adequately represented the class.

Birmingham) had not purported to represent the *Richards* plaintiffs:

> [T]here is no reason to suppose that the *Bedingfield* court [the court hearing the first case] took care to protect the interests of petitioners in the manner suggested by *Hansberry*. Not is there any reason to suppose that the individual [plaintiff] taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers. Thus, to contend that the plaintiffs in *Bedingfield* somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be "to attribute to them a power that it cannot be said that they had assumed to exercise." *Hansberry*, 311 U.S., at 46.

Richards, 517 U.S. at 1768. In other words, the plaintiffs in the second action could not, consistently with due process, be bound by the first action because *procedures* adopted in the first action were not designed to protect the rights of those sought to be bound -- *not* because *Hansberry* grants absent class plaintiffs a generalized right to collaterally challenge class action judgments based on alleged inadequacy of notice or alleged inadequacy of representation.[7]

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[7] Because the Second Circuit did not base its decision on any inadequacy of notice to the class, that issue is not before the Court. *See* Pet. App. 19a n.8. WLF notes, however, that both the district court and the Second Circuit have on prior occasions determined, after full and fair consideration, that notice to the class was sufficient to satisfy due process concerns. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994). Respondents have not pointed to any procedural deficiencies in the manner in which the district court and Second

(continued...)

In sum, Respondents are bound by the *Agent Orange I* judgment in the absence of evidence of any deficiency in the procedures by which the courts determined that all absent class members had been adequately represented.

B. *Amchem* and *Ortiz* Do Not Purport to Confer Any Right to Collaterally Attack Class Action Judgments Based on Inadequacy of Representation

The Second Circuit's opinion makes clear its belief that the decision to allow Respondents' claims to go forward was mandated by this Court's recent *Amchem* and *Ortiz* decisions. Indeed, the very first sentence in the opinion states, "This appeal requires us to determine the effect of the Supreme Court's landmark class action decisions in [*Amchem*] and [*Ortiz*] on a previously settled class action concerning exposure to Agent Orange during the Vietnam War." Pet. App. 1a-2a. A significant portion of the remainder of the opinion is devoted to explaining why, in the Second Circuit's view, *Amchem* and *Ortiz* prevent application of *res judicata* to this case.

The Second Circuit has read far too much into *Amchem* and *Ortiz*. Both cases arose in the context of direct appeals from district court orders approving class action settlements. While in each case the Court determined that the settlement should not have been approved because not all absent class plaintiffs were adequately represented, neither case so much as mentions the subject of collateral attacks on approved class action settlements.

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[7](...continued)
Circuit arrived at those determinations.

Amchem held that Rule 23 prohibited approval of the settlement of a Rule 23(b)(3) class action involving (possibly) millions of individuals who had been exposed to asbestos manufactured by one or more of 20 companies. The Court held that the named plaintiffs could not adequately represent the plaintiff class because the interests of those within the class were antagonistic to one another (e.g., the goals of those who had already been injured were far different from the goals of those who had been exposed to asbestos but had not yet suffered any injury). *Amchem*, 521 U.S. at 626. *Ortiz* reached a similar result with respect to efforts to gain approval of a settlement of a massive Rule 23(b)(1) "limited fund" class action. *Ortiz*, 527 U.S. at 864-65.

It may well be that the district court, had *Amchem* and *Ortiz* already been decided at the time of *Agent Orange I*, would not have approved the proposed settlement. Certainly, in light of *Amchem* and *Ortiz*, there is some reason to question whether the class plaintiffs adequately represented the entire class. But that is not the issue before this Court. The district court, after a full and fair airing of the issue, determined that the class plaintiffs did adequately represent the class, and that determination was affirmed on direct appeal. As explained above, that determination is no longer open to challenge in the absence of evidence of a deficiency in the procedures employed in arriving at the determination.

It is worth noting that the evidence here regarding the adequacy of representation was far stronger than in either *Amchem* or *Ortiz*. While the interests of injured plaintiffs and exposure-only plaintiffs were in direct conflict with one another in *Amchem* and *Ortiz*, that conflict is far more muted here. First, as noted above, the district court determined that virtually all exposure-only class members who would

eventually suffer disability or death due to their exposure to Agent Orange would do so by 1994; thus, the district court held, the settlement in effect provided equal funding to virtually all injured class members, regardless of the date of disability or death. Second, the district court and Second Circuit determined that all class members were alike in one very important respect: all of their claims were quite weak. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 167 (2d Cir. 1987), *cert. denied,* 474 U.S. 1004 (1988). In its latest decision, the Second Circuit refused to examine the relative weakness of the claims of the various class members. The court stated that Petitioners' argument in support of such an examination "misses the mark," arguing that such an examination is not relevant in "assessing adequacy of representation and intra-class conflicts." Pet. App. 20a. With all due respect, it is the Second Circuit's argument that misses the mark. If the claims of all members of a class are uniformly weak, the potential for intra-class conflicts is reduced considerably.

But the Court need not address the issue of intra-class conflicts in order to rule for Petitioners. It is enough that the issue of adequacy of representation was addressed extensively on numerous occasions in the past 20 years, and on each occasion (prior to the decision below) the issue was decided adversely to Respondents. In the absence of any evidence that the process by which the courts arrived at those determinations was procedural deficient, Respondents have received all the process to which they are due and thus are bound by the judgment in Agent Orange I.

II. THE DECISION BELOW IS UNFAIR TO DEFENDANTS AND WILL UNNECESSARILY DISCOURAGE THE SETTLEMENT OF CLASS ACTIONS

An inevitable result of the Second Circuit's decision, if allowed to stand, will be to increase the uncertainty surrounding all class action judgments. No longer can the parties to such judgments rest assured that the litigation has thereby been brought an end; the Second Circuit's open-ended endorsement of collateral challenges to class action judgments means that such judgments are subject to being re-opened years down the road by absent class members challenging the adequacy of notice or of representation.

That result is particularly unfair to defendant who (as was true here) never agreed to certification of the class action. As a result of a decision to certify a large plaintiff class, defendants often face "intense pressure" to enter into a class-wide settlement because of the potential of an enormous damage award if the case goes to trial. *See Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.), *cert. denied,* 516 U.S. 867 (1995). Yet, pursuant to the Second Circuit's decision, such defendants have no assurance that funds paid out pursuant to such settlements will actually achieve the desired litigation cease-fire.

Indeed, defendants in a certified class action may well find themselves in an untenable heads-I-win-tails-you-lose situation, even if the class certification order is affirmed on direct appeal. If the defendant loses at trial, he will be expected to pay damages to all class members. But any victory at trial for the defendant (or a class-wide settlement) may turn out to be pyrrhic if absent class members are free

to file a new suit raising identical claims, and then to assert that they are not bound by the judgment because of inadequacy of class notice or representation.

As the Court noted in *Shutts*, a class action defendant has a strong interest in ensuring that the entire plaintiff class is as bound by any judgment entered in the case as it is. *Shutts*, 472 U.S. at 805 ("Whether it wins or loses on the merits, [a class action defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [the defendant] is bound."). That interest is upset by the Second Circuit's decision. It thereby transforms Rule 23 from a device designed to facilitate the efficient adjudication of similar claims into a one-sided procedure that places defendants at a decided disadvantage.

At the very least, one can expect the Second Circuit's decision to discourage appreciably the settlement of class action suits. Defendants will have far less reason to commit significant sums to the settlement of such suits if they can have no assurance that absent class members will be barred from renewing settled claims. Such a decrease in settlement rates will serve only to further clog our nation's courts and to delay the receipt of compensation by injured plaintiffs with valid claims.

CONCLUSION

The Washington Legal Foundation respectfully requests that the judgment of the court of appeals be reversed.

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IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members had a full opportunity to opt out, object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class.

2. Whether, if collateral attack is permissible, the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of events and changes in the law occurring years after the settlement has become final and all of the settlement proceeds have been disbursed.

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IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the Product Liability Advisory Council as *amicus curiae* in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 129 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States

[1] Consent from counsel for petitioners and respondents has been filed with the Clerk of this Court. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A. As frequent participants in, and observers of, class action settlements and litigation, PLAC's members have a real and concrete interest in the resolution of the questions presented in this case.

SUMMARY OF ARGUMENT

This case presents a question of profound importance in the class action arena: Is a class action judgment or settlement *ever* final? The Second Circuit answered "no" by dramatically reopening the Agent Orange global settlement agreement, long thought a closed chapter of American legal history. In the process, the court created a novel rule of law that affords absent class members a broad – and potentially boundless – right to bring a collateral attack to a class action judgment or settlement on the ground that the class representative did not adequately represent the class.

If upheld, the Second Circuit's ruling could, at least in principle, threaten to upset the finality of *every* class action settlement or judgment ever reached. And by radically destabilizing settled class action determinations, the court's rule would render the class action device a precarious (and thus highly undesirable) method for resolving disputes. It would, in effect, place a question mark after every "It is so ordered" entered on the Nation's class action docket. Yet it

is precisely in the class action context that finality, repose, and voluntary settlements of disputes are perhaps most highly valued and urgently needed. In other words, the Second Circuit's decision erects a special class action collateral attack rule that will inevitably – and quite perversely – thwart the primary objectives of the class action device. Indeed, it is difficult to imagine a rule of law that would more seriously undermine the core utility and rationale of class actions.

No constitutional or statutory provision requires such a rule, no precedent of this Court supports it, and no sensible policy objective would be furthered by its adoption. The Court should therefore reverse the decision below and make clear that a collateral attack of a class action judgment or settlement on adequacy of representation grounds must be limited to minimal review of the fairness of the procedures employed by the certifying court. *See Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999).

ARGUMENT

In principle, the rule of law that the Second Circuit announced could permit dissatisfied class members to wage collateral attacks on any and all class action decisions – whether reached in state or federal court, and whether reached last week, last decade, or perhaps even a quarter-century ago. The only requirement is that the plaintiff mounting the collateral attack assert, on the basis of subsequent developments or new legal standards not applicable at the time the class originally was certified, that his or her particular interests were not adequately represented. And the only discernible protection for class action defendants would be the purely accidental fact that, in some cases, there may be no class members who wish to bring such an attack.

Yet, a central feature of the modern class action device is that a class action determination reached after compliance with class action procedures precludes the claims of *all* class

members. As demonstrated below, the broad collateral attack rule adopted by the Second Circuit below is flatly inconsistent with that core class action objective, as well as its related objectives of avoiding duplicative litigation and fostering voluntary settlements. In order to prevent collateral review from undermining the utility, and basic fairness, of the class action device, such review must be extremely limited. It should not extend beyond a review of the fairness of the procedures employed by the certifying court. Because modern class action procedural rules ensure fundamental fairness to the class, conscientious application of those rules by the certifying court should be a sufficient ground for rejecting most, if not all, collateral attacks brought on adequacy of representation grounds.

I. A BROAD RIGHT TO RELITIGATE ADEQUACY OF CLASS REPRESENTATION WOULD THREATEN THE FINALITY OF COUNTLESS CLASS ACTION DECISIONS, UNDERMINING CORE CLASS ACTION PURPOSES.

The Second Circuit's broad collateral attack rule threatens the finality of all class action determinations reached to date, as well as the finality of all pending and future class proceedings. Without some secure promise of finality, class actions will lose much – if not all – of their utility as a dispute resolution mechanism. No matter how diligently the litigants or the court attempt to craft a fair resolution of a class conflict – including sustained efforts to ensure the adequate representation of absent class members – substantial doubts as to the binding effect of any determination would remain. There would always be a risk – as demonstrated in this very case – that some absent class member might emerge years later to announce his discontent for the first

time.[2] Whenever such an attack is made, the Second Circuit's rule authorizes plenary, *de novo* reconsideration of the initial court's adequacy of representation determination. Pet. App. 16a-20a.

Such a broad collateral attack rule is plainly inconsistent with the judiciary's obligation to secure the finality of legal judgments. *See, e.g., Southern Pac. R. Co. v. United States*, 168 U.S. 1, 49 (1897) (Harlan, J.) ("Th[e] general rule [of *res judicata*] is demanded by the *very object for which civil courts have been established*, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination") (emphasis added); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (preclusion doctrines "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication"). That obligation serves fundamental principles of societal justice,[3] and must take precedence *even* over claims that equity or unforeseen circumstances suggest a different result in a particular case. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S.

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[2] *See* Geoffrey P. Miller, *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan & Silberman*, 73 N.Y.U. L. Rev. 1167, 1169 (1998) ("All class action settlements, however generous to the class, however competently litigated, and however much the product of adversarial, arm's-length negotiations between the parties, would be open to collateral attack in a subsequent forum. There is nothing the parties in the first forum can do to prevent this danger.").

[3] *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (*res judicata* is a rule of "'fundamental and substantial justice'" and a rule "'of public policy and of private peace'" (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)); *Reed v. Allen*, 286 U.S. 191, 198-99 (1932) (doctrine of *res judicata* was "conceived in the light of the maxim that the interest of the state requires that there be an end to litigation – a maxim which comports with common sense as well as public policy").

394, 401 (1981) ("The doctrine of *res judicata* serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case."); *Reed v. Allen*, 286 U.S. 191, 199 (1932) ("mischief which would follow the establishment of a precedent for . . . disregarding this salutary doctrine against prolonging strife *would be greater than* the benefit which would result from relieving some case of individual hardship") (emphasis added).

The Second Circuit claimed that its collateral attack rule was not a challenge to finality *per se*, but simply a means of determining whether the conditions justifying finality exist. *See* Pet. App. 16a ("Plaintiffs do not attack the merits or finality of the settlement itself, but instead argue that they were not parties to that judgment. If plaintiffs were not proper parties to that judgment, . . . *res judicata* cannot defeat their claims."). But this argument overlooks what is perhaps the core purpose of the modern class action: namely, affording preclusive effect of a class action determination to the claims of *all* class members. *See* 18A Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 4455, at 448 (2d ed. 2002) ("The *central purpose* of each of the various forms of class action is to establish a judgment that will bind not only the representative parties but all nonparticipating members of the class certified by the court. . . . The efficient, consistent, and fair determination of indistinguishable claims is a paramount goal. That goal *requires preclusion*.") (emphasis added); *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.").[4]

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[4] *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (recognizing obvious and immediate injury to defendant caused by permitting class action judgment to become final "without binding the plaintiff class"); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 367 (1921) ("If the [class action] decree is to be effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree."); *Jamerson v. Lennox*, 356 F. Supp. 1164, 1169 (E.D. Pa. 1973) (fact that prior litigation was a class action "weighs in favor of, not against, applying *res judicata*; an obvious purpose of permitting class action is to bind the members of the class").

In other words, plenary collateral review is not necessary, as the Second Circuit supposed, to create the circumstances justifying finality. Those circumstances are present by virtue of compliance with Rule 23 itself.[5] *See* Fed. R. Civ. P. 23(c)(3) ("The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, *shall include* and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.") (emphasis added). Rule 23 creates, in effect, a presumption in favor of classwide preclusion: where the requirements of the rule are met, classwide preclusion is justified as to all persons who remain class members at the time judgment is entered. *See* 7B Wright *et al.*, *supra*, § 1789, at 244 ("The obvious implication of Rule 23(c)(3) is that anyone properly listed in the judgment should be bound by it *absent some special reason for not doing so*.") (emphasis added); 7A Wright *et al.*, *supra*, § 1765, at 264 ("[A]ll absent class members in Rule 23(b)(3) actions . . . *usually will be bound* by the determination in the suit . . . .") (emphasis added).

Indeed, one of the main goals of the 1966 amendments to Rule 23 was to buttress this central objective of classwide preclusion. The original 1937 rule contained no provision analogous to Rule 23(c)(3), and thus generated considerable uncertainty as to what circumstances would justify classwide

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[5] The same conclusion would apply, of course, as to collateral review of adequacy determinations made under the many state class action procedural rules modeled on Fed. R. Civ. P. 23.

preclusion. *See* Fed. R. Civ. P. 23 advisory committee's note (explaining that original class action rule failed to "squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class").[6] The drafters of the 1966 amendments to Rule 23 purposely sought to rectify these deficiencies by providing that "all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class." *Id.* The new rule also outlined, with the express aim of ensuring the preclusive effects of class action judgments to the greatest extent possible, the procedural "measures which can be taken to assure

[6] Preclusion under the original rule was further complicated by the concept of "spurious" class actions – *i.e.*, actions, such as this case, involving "'several' rights affected by a common question and related to common relief"— to which courts gave no preclusive effect at all. *Id.* Absent class members could be affected by a "spurious" class action judgment only insofar as those members wished to obtain the benefits of a favorable judgment in a disfavored procedure aptly termed "one-way intervention." *See id.* (noting that courts in "spurious" class actions had "held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision."). These preclusion rules came to be seen as unsatisfactory – not only because courts found it exceedingly difficult to distinguish between "spurious" class actions and other categories of class actions that were afforded greater preclusive effect (so-called "true" or "hybrid" class actions), but more importantly because the rationale for denying preclusive effect to "spurious" class actions undercut the central objectives of the class action device. *See id.* ("The 'spurious' action envisaged by original Rule 23 was in any event an anomaly because, although denominated a 'class' action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party.").

the fair conduct of [class] actions." *Id.*[7]

The Second Circuit's adoption of a broad collateral attack rule effectively vitiates the 1966 amendments to Rule 23. By requiring collateral proceedings to establish the conditions for preclusion, its rule thwarts amended Rule 23's core objective of establishing *at the time of judgment* the justification for classwide preclusion. *See* Linda Silberman, *The Vicissitudes of the American Class Action—With A Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201, 214 (1999) (collateral attacks on adequacy determinations "represent[] serious danger to the finality that is the essence of class litigation and settlements"); Note, *Collateral Attack on the Binding Effect Of Class Judgments*, 87 Harv. L. Rev. 589, 605 (1974) ("An unlimited and ill-defined scope of collateral review threatens the finality of class action judgments and the usefulness of the class action device, reversing a century-long trend in the development of the class action rule.").

In addition, the Second Circuit's novel rule would revive, in a somewhat different form, the problem of "one way" preclusion, *see supra* note 6, by permitting absent class members to sit back and await a class action judgment or settlement before deciding whether or not to be "bound" by that determination. *See* Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 Sup. Ct. Rev. 219, 268 (1996) [Kahan & Silberman I] (noting that

[7] *See also In re General Motors Corp. Pick-Up Truck Prod. Liab. Litig.*, 55. F.3d 768, 785 (3d Cir. 1995) (procedural requirements of Rule 23 were designed "so that the court can assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests."). The amended rule also facilitated classwide preclusion by eliminating the traditional categorization of "true," "hybrid," and "spurious" class actions, and by abolishing the concept of one-way intervention. *See* Fed. R. Civ. P. 23 advisory committee's note.

liberal collateral attack rule creates a "post-settlement opt-out" right); Note, *supra*, at 602 (observing that broad collateral attack rule creates "'a return to one-way intervention under a new guise,'" and that defendants might be "placed in the position of having gone through complex and expensive class action litigation only to be forced to relitigate the entire controversy again against parties that would have participated in the judgment if it had been favorable to them.") (quoting *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968)). Yet one of the primary insights of the 1966 amendments is that the class action device can be effective *only* if the judgment conclusively resolves the claims of *all* class members, *regardless* whether the judgment or settlement is favorable to the class.

The Second Circuit's broad collateral attack rule is also directly inconsistent with the class action objective of avoiding duplicative litigation of the same basic issues. A class cannot be certified, and thus cannot proceed to judgment, or settlement, *see Amchem Products v. Windsor*, 521 U.S. 591, 620-21 (1997), unless the certifying court determines that the class representatives are adequate. Fed. R. Civ. P. 23(a)(4). A broad collateral attack rule, by authorizing a second, *de novo* determination of the adequacy of representation issue, promises at least two bites at the apple on the identical legal issue, thus replicating the very inefficiencies that the class action mechanism was designed to avoid. *See* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765, 779 (1998) [Kahan & Silberman II] ("From the perspective of efficiency . . . multiple determinations of the same issue undermine the very efficiencies sought to be achieved by the class action mechanism"); William T. Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA, 73 N.Y.U. L. Rev. 1149, 1159-60 (1998) (collateral attacks "reinvent[] the problem of inefficiency and second guessing that is solved by the rule of

finality and recognition of judgments").[8]

Finally, and for similar reasons, a broad collateral attack rule will seriously interfere with litigants' incentive to settle class action disputes. Many courts have recognized that the general public policy favoring voluntary settlements is paramount in the class action context because of the administrative burdens that complex class litigation imposes on the courts. *See, e.g., Bano v. Union Carbide Corp.*, 273 F.3d 120, 129 (2d Cir. 2001) ("public interest in amicable resolution of cases is particularly strong in the context of mass tort and similar litigation").[9] Yet despite the pressing nature of this concern in the class action context, the Second Circuit's collateral attack rule makes voluntary settlement of class actions uniquely difficult to achieve. Why would any rational defendant agree to settle if it cannot achieve peace and repose with respect to the entire class? At the very least, the risk that a class settlement might be disturbed, years later, by a now-silent class member will substantially discourage defendants from entering into any class settlement. *See* Kahan & Silberman II, *supra*, at 779 & n.66 (possibility of one successful collateral attack, however weak its merits, creates "potential for double liability [that] will increase the ex-

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[8] In fact, the number of collateral attacks is limited only by the number of dissatisfied class members who ultimately choose to wage such attacks. *See* Kahan & Silberman II, *supra*, at 784 ("[T]here may well be several bites at the apple. If the collateral attack on behalf of a second class member in another forum fails, another collateral attack on behalf of a second class member in another forum is available, and if that fails, a third; and so on.").

[9] *See also In re The Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000) ("general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions"), *cert. denied*, 533 U.S. 903 (2001); *In re Gen. Motors Corp. Pick-Up Truck.*, 55 F.3d at 805 (noting "urgency of [public] policy [favoring settlements] in complex actions that consume substantial judicial resources and present unusually large risks for the litigants").

pected liability of defendants and severely impede the ability to settle a class to start with"); Note, *supra*, at 600 (same).

For all of these reasons, it is clear that the Second Circuit's seemingly boundless collateral attack rule directly interferes with the main objectives of the modern class action device. In order to prevent that result, collateral attacks on adequacy of representation grounds must be narrowly circumscribed. If the class receives proper notice of the proceeding, and the court provides a full and fair opportunity for class members to raise objections to the adequacy of the class representation, the certifying court's adequacy of representation determination should be final and conclusive with respect to all class members. As a general rule, class members wishing to raise adequacy objections must do so before the certifying court, and, if necessary, before appellate courts on direct review. *See Epstein*, 179 F.3d at 648.

Proponents of a broad collateral attack rule have argued that any other approach would effectively require absent class members to intervene before the certifying court to raise objections to the adequacy of the class representation, and that "attribution of preclusive effect to a failure to intervene" is inconsistent with the federal rules of civil procedure, which impose no such mandatory intervention in these circumstances. *Martin v. Wilks*, 490 U.S. 755, 765 (1989); *see* Patrick Woolley, *The Availability of Collateral Attack For Inadequate Representation in Class Suits*, 79 Tex. L. Rev. 383, 402-04 (2000). But the Court in *Martin* merely held that attribution of preclusive effect to a failure to intervene would be inconsistent with the procedural rules governing intervention – Rules 19 and 24. *See Martin*, 490 U.S. at 765. Rule 23, however, is critically different in that, as discussed above, "[t]he whole point of the class action procedure – and what distinguishes it from permissive intervention – is its basic premise that a judgment does have binding effect on absent class members who are designated as such

through the class action certification procedure of Rule 23 or its state counterparts." Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison*, 73 N.Y.U. L. Rev. 1193, 1202 (1998) [Kahan & Silberman III].[10]

A related argument offered in favor of the Second Circuit's rule rests on this Court's statement in *Shutts* that "an absent class-action plaintiff is not required to do anything" and is "not required to fend for himself." *Shutts*, 472 U.S. at 809-10; *see Epstein v. MCA, Inc.*, 126 F.3d 1235, 1245 (9th Cir. 1997), *rev'd*, 179 F.3d 641 (9th Cir. 1999). But it is plainly a misreading of *Shutts* to interpret these words – which were written to support the conclusion that the "minimum contacts" personal jurisdiction requirement did not apply to class action plaintiffs – as a holding that absent class members cannot be obliged to present their adequacy objections to the certifying court. Moreover, to the extent *Shutts* sheds light on the question before the Court in this case, its recognition of absent class members' ability to remain passive during the class proceeding actually undermines the need for a broad collateral attack rule. That is because, as the Court noted, the absent class members are justified in relying upon the certifying court, and the defendant opposing class certification, to protect their interests. *See Shutts*, 472 U.S. at 809; *see also Epstein*, 179 F.3d at 648; *infra* at 28.

In sum, the broad collateral attack rule endorsed by the Second Circuit is flatly inconsistent with core objectives of the class action device, including conclusive and final class-

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[10] In any event, the premise of this objection – that mandatory intervention necessarily follows from rejection of a broad collateral attack rule – is simply mistaken. It is well established that absent class members may raise objections before the certifying court by way of "appearance." *See* Fed. R. Civ. P. 23(c)(2). And as this Court recently held, formal intervention is not a prerequisite to an absent class member's ability to bring a direct appeal. *See Devlin v. Scardelletti*, 536 U.S. 1 (2002).

wide preclusion, avoidance of duplicative litigation, and facilitation of voluntary settlements. If upheld, the ruling below threatens to undermine the very utility of the class action device, and to create tremendous legal uncertainty in an area of the law in which finality and repose are perhaps most necessary. Given the numerous adverse consequences implicit in a broad collateral attack rule, such a rule could be justified only if there were truly compelling reasons mandating its adoption. As demonstrated below, no such reason exists.

II. THERE IS NO AUTHORITY OR JUSTIFICATION FOR ALLOWING BROAD COLLATERAL ATTACK.

Proponents of a broad collateral attack rule largely ignore the fundamental inconsistencies between such a rule and the core objectives of the class action device. Instead, proponents rely on several arguments that, in their view, *compel* adoption of such a rule. Thus, it is argued that (1) basic principles of *res judicata* mandate a "right" to bring a broad collateral attack to the substance of the initial court's adequacy of representation determination; (2) the Due Process Clause mandates such a right; and (3) a broad right of collateral attack is necessary in order to provide adequate protection for the absent class members. As demonstrated below, none of these arguments has merit. At the end of the day, there is no authority or justification for adopting a rule that creates such intractable impediments to efficient class action practice and procedure.

A. Basic Principles of *Res Judicata* Do Not Require – Or Even Support – A Broad Collateral Attack Rule.

As noted, proponents of a broad collateral attack rule argue that such a rule is mandated by basic principles of *res judicata*. One of those basic principles is that a court "cannot predetermine the *res judicata* effect of [its own] judgment," which "can be tested only in a subsequent action." Fed. R. Civ. P. 23 advisory committee's note (citing RESTATEMENT OF JUDGMENTS § 86 cmt h; § 116 (1942)); 7B Wright *et al.*, § 1789, at 245; *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (same); *Shutts*, 472 U.S. at 805; Pet. App. 14a (relying on *Shutts*). Because adequacy of representation is a prerequisite to class action preclusion, *see Hansberry v. Lee*, 311 U.S. 32, 42 (1940), this argument goes, there must be a right to bring a collateral attack on the ground that the representation was, in fact, inadequate. Thus, in the Second Circuit's words, respondents' "collateral attack, which seeks only to prevent the prior settlement from operating as *res judicata* to their claims, is permissible." Pet. App. 13a. Having decided that the attack was permissible, the court below went on to decide *for itself* whether the class representatives adequately represented the absent class members in the original proceeding. *See id.* at 16a-20a.

The Second Circuit appears to have concluded that a "permissible" collateral attack entails plenary, *de novo* review of the substance of the initial court's adequacy determination. But that conclusion simply does not follow from the principle that a court may not predetermine the *res judicata* effect of its own judgment – which may well support some form of "testing" by a collateral court. *See* Note, *supra*, at 594 (distinguishing between right to bring collateral attack, and "nature and scope of review to be applied" in collateral attack). In fact, plenary, substantive review of prior determinations is but one, exceedingly rare and highly controversial, form of collateral review. *See, e.g., Brown v. Allen*, 344 U.S. 443, 458 (1953) (federal courts may exercise independent judgment of constitutional claims on collateral, habeas corpus review of state court judgments). It is in no way a necessary component of collateral review, let alone its most prevalent form. *See Williams v. Taylor*, 529 U.S. 362,

411 (2000) (interpreting 28 U.S.C. § 2254, which substantially narrowed the scope of habeas review, and permits issuance of the writ only where state court application of federal law is "unreasonable");[11] *see also Martin*, 490 U.S. at 771-72 & n.6 (Stevens, J., dissenting) ("In both civil and criminal cases, . . . the grounds that may be invoked to support a collateral attack are much more limited than those that may be asserted as error on direct appeal.").

Consideration of the way in which courts treat collateral attacks brought on jurisdictional grounds reinforces the point that plenary reconsideration of previously decided issues on collateral attack is exceedingly rare. A party ordinarily may

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[11] *See also Wright v. West*, 505 U.S. 277, 285 (1992) (noting that, prior to 1953, scope of federal habeas review was limited to inquiry whether defendant had a full and fair opportunity to litigate claims in state court); *Bousley v. United States*, 523 U.S. 614, 621 (1998) (circumstances under which guilty plea may be attacked on collateral review of federal conviction are "strictly limited"; habeas review is an "extraordinary remedy and will not be allowed to do service for an appeal") (citation and internal quotation marks omitted); *Hill v. United States*, 368 U.S. 424, 428 (1962) (habeas relief under § 2255 available only for "fundamental defect which inherently results in a complete miscarriage of justice"); *Reed v. Farley*, 512 U.S. 339, 353-54 (1994) (applying *Hill*'s "fundamental defect" standard to habeas review of state conviction based on non-constitutional, statutory grounds); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) ("The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence.").

This Court's consistent limitation of the writ of habeas corpus is instructive not only because it demonstrates that full relitigation is not integral to the concept of collateral review, but because it severely undercuts any claims by absent class members in civil cases that a limited right of collateral attack would be fundamentally unfair. *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 373 (1999) ("[I]t would be ironic if the restrictive development of recent habeas jurisprudence were to leave capital penalty defendants with highly constricted nonappeal routes of challenge, but would afford that same opportunity to absent class action plaintiffs.").

bring a collateral attack to a prior judgment on the ground that the first court lacked personal jurisdiction over him. But a collateral attack on personal jurisdictional grounds – which is as much a component of Due Process as is the requirement of adequate representation, *Hansberry*, 311 U.S. at 40-41 – is completely foreclosed if the issue of personal jurisdiction was actually resolved in the first action. *See Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-26 (1931); James Wm. Moore *et al.*, MOORE'S FEDERAL PRACTICE § 131.30[2][a], at 131-94 (3d ed. 2002). Likewise, although a court without subject matter jurisdiction has no power to decide the case before it, a final judgment rendered by such a court is conclusive, and generally immune from collateral attack on the grounds that jurisdiction was lacking. *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706-07 & n.13 (1982) ("This Court has long recognized that '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues.'") (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932)). Indeed, the rule that subject matter jurisdiction generally may not be challenged on collateral attack applies even where the initial court's jurisdictional determination is implicit. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) ("Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.").[12]

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[12] To be sure, exceptions to this general rule exist. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982) (collateral attack challenging subject matter jurisdiction permissible only on the ground that subject matter of the action was "so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority," permitting the judgment to stand would substantially infringe another tribunal's authority, or where original court lacked the capability to make an informed judgment and "procedural fairness" favors such an attack). But those

The subject matter jurisdiction example is particularly instructive because it rests on the concept that a court has "jurisdiction to determine jurisdiction" – that is, a court has the authority to resolve finally and conclusively a question (its very power to decide) that is a prerequisite to preclusion. *See Chicot County Drainage Dist.*, 308 U.S. at 376 (courts of limited jurisdiction nonetheless have authority "to determine whether or not they have jurisdiction" and "[t]heir determinations of such questions, while open to direct review, may not be assailed collaterally"); *Page v. Schweiker*, 786 F.2d 150, 154 (3d Cir. 1986). In similar fashion, class action procedure mandates a full consideration of the adequacy of representation issue before the first judgment properly can be reached. Fed. R. Civ. P. 23(a)(4); *Amchem*, 521 U.S. at 620-21. In other words, class action procedure treats adequate representation as a kind of jurisdictional prerequisite to hearing the case *as a class action*. Once decided, that determination, like a determination as to subject matter jurisdiction, generally should be immune from collateral reexamination.[13]

In sum, the principle that a party has a "right" to test the preclusive force of a prior judgment provides no basis whatsoever for holding that collateral review must be of the plenary kind envisaged by the Second Circuit, as opposed to the

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exceptions simply underscore the point that plenary reconsideration of previously litigated issues is generally unavailable.

[13] Of course, application of the "jurisdiction to determine jurisdiction" concept ordinarily presupposes the actual presence of the party to be bound in the initial proceeding, *see Chicot County Drainage Dist.*, 308 U.S. at 376 – an element obviously lacking when applied to absent class members who make no appearance before the certifying court. But the supposed requirement of actual participation by absent class members in order to justify preclusion is very much the heart of the question before this Court. The point here is simply this: the notion that *res judicata* principles require all prerequisites to preclusion to be *independently examined* by the collateral court is flatly wrong.

Ninth Circuit's far more limited rule that collateral review of adequacy of representation issues is appropriate only to review the adequacy of procedures before the certifying court. *Epstein*, 179 F.3d at 648-49. To the extent settled *res judicata* principles speak to the question of the appropriate scope of collateral review at all, those principles indicate, as discussed above, that full reconsideration of an issue actually resolved in the first proceeding is the exception rather than the rule.

B. The Due Process Clause Only Requires Procedures That "Fairly Insure" Adequate Representation Of The Absent Class Members' Interests.

Since the justification for a broad collateral rule cannot be located in general *res judicata* principles, proponents of such a rule argue that the Due Process Clause mandates plenary consideration of the certifying court's adequacy of representation determination. The principal authority for this argument is said to be *Hansberry v. Lee*, 311 U.S. 32 (1940), in which this Court held that the Due Process Clause requires some form of adequate representation to support classwide preclusion. *See id.* at 41. If *Hansberry* is read to require adequate representation *in fact* as an element of Due Process, a collateral court could not give preclusive effect to a judgment rendered in violation of that requirement. *See Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996). In that event, the Due Process limitation on general preclusion principles might require the collateral court to reach an independent judgment as to the adequacy of representation in the initial proceeding. *See* 7B Wright *et al.*, *supra*, § 1789, at 249-50 ("The key to obtaining the fullest possible binding effect for a class action judgment . . . depends on determining what elements are necessary to satisfy due process.").

The fatal flaw in this argument is its premise that *Hansberry* interpreted the Due Process Clause to guarantee ade-

quate representation in fact. In defining the circumstances in which inadequate representation would violate Due Process, the Court stated that "there has been a failure of due process *only* in those cases where it cannot be said that the procedure adopted, *fairly insures* the protection of the interests of absent parties who are to be bound by it." *Hansberry*, 311 U.S. at 42 (emphasis added); *see id.* at 43 (noting potential constitutionality of "procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue");[14] *Richards*, 517 U.S. at 802 (finding adequacy of representation lacking where there was no evidence that the initial court "*took care to protect* the interests [of the absent parties] in the manner suggested in *Hansberry*") (emphasis added); *Epstein*, 179 F.3d at 648 ("Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review").[15]

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[14] It is true that the Court in *Hansberry* also stated that "[i]t is *familiar doctrine of the federal courts* that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties." *Hansberry*, 311 U.S. at 42-43 (emphasis added); *Epstein*, 126 F.3d at 1245 (relying on this passage to support broad collateral attack rule), *rev'd* 179 F.3d 641 (9th Cir. 1999). But that very quotation is limited to the judge-made doctrine of preclusion – not the requirements of the Due Process Clause – and thus cannot be read to support the conclusion that Due Process requires adequate representation in fact.

[15] *See also Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558 (3d Cir. 1994) (opportunity to be heard and direct appeal provided "all the process that was due" to bind the entire class); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991) (classwide preclusion warranted where "acceptable procedural safeguards have been employed"); *cf. Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982) (minimal due process requirement entitling judgment to full faith and credit is violated only where "'there is reason to doubt the quality, extensiveness, or fairness of *procedures* followed in prior litigation'") (quoting *Montana v. United States*, 440 U.S. 147, 164 n. 11 (1979)) (emphasis added).

Indeed, *Hansberry*'s Due Process holding cannot sensibly be read otherwise. The initial state court proceeding in *Hansberry* was not a formal class action proceeding at all. The trial court did not formally designate the case as a class proceeding, made no express findings that the purported class representatives were adequate representatives, and did not give absent class members notice or an opportunity to be heard in the initial proceeding. *See Hansberry*, 311 U.S. at 38-39. Thus, *Hansberry*, at most, requires broad collateral review of the adequacy of representation issue where no prior determination had been made on that issue, and where the absent class members were denied a full and fair opportunity to participate in the proceedings. The decision does not mandate such review where, as here, the certifying court scrupulously adheres to Rule 23's procedural protections, takes measures to protect the absent class members' interests, and expressly resolves the adequacy of representation issue after affording absent members an opportunity to participate. *See* Kahan & Silberman I, *supra*, at 266-67.[16]

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[16] For similar reasons, this Court's statement in *Shutts* that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members," *Shutts*, 472 U.S. at 812, cannot be read to resolve the precise question before the Court here. *See Epstein*, 179 F.3d at 648 ("[N]owhere in *Shutts* did the Court state or imply that where the certifying court makes a determination of the adequacy of representation in accord with *Shutts*, this determination is subject to collateral review.").

This procedural interpretation of the adequacy of representation requirement is consistent with this Court's flexible, pragmatic approach to explicating the requirements of the Due Process Clause. *See generally Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (noting that due process "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," and that it is "flexible and calls for such procedural protections as the particular situation demands") (citations and internal quotation marks omitted). Thus, the Due Process notice requirement – a requirement, like adequacy of representation, necessary to support classwide preclusion – is not violated whenever notice fails to reach its intended recipient. On the contrary, Due Process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also* Fed. R. Civ. P. 23(c)(2) (requiring "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). Because the Due Process Clause does not require that each absent class member actually *receive* notice, a collateral attack seeking to reopen a class determination on that ground, despite the provision of the best practicable notice under the circumstances, necessarily would fail. *See Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1486-87 (D.C. Cir. 1992); Moore *et al.*, *supra*, § 131.40[3][e], at 131-155 ("[F]ailure of the plaintiff to *receive* [] notice in the prior action is not, by itself, sufficient to defeat the preclusive effect of a class action judgment.").

There is no reason to think that Due Process requires a more exacting adequacy of representation standard.[17] Just as

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[17] *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 392 (1967) ("[N]otice . . . joins with other features of the new rule in helping to justify the ultimate extension of the judgment in (b)(3) cases to all members of the class, except those who requested exclusion from the action: recall *Hansberry v. Lee* with its suggestion that the *validity of class adjudication is related to the fairness of the procedural forms through which the adjudication is attained.*") (emphasis added).

delivery of notice to individual class members cannot be guaranteed, *see Peters*, 966 F.2d at 1486 ("[T]he due process clause does not amount to a guarantee of notice to a class member"; "[d]espite technological advances, the mail is not one hundred percent reliable"), so too "adequacy of representation" *in fact* cannot be guaranteed with complete certainty. This is especially so given that the adequacy of representation inquiry is highly fact-dependent and discretionary in nature, and is thus susceptible to a range of differing, yet reasonable, conclusions. *See infra* at 29. The certifying court must, of course, ensure that class counsel diligently represents the class, and that the representative's interests do not substantially conflict with those of other class members. But merely because a collateral court concludes that it would have reached a somewhat different discretionary judgment – say, because the adequacy issue appears differently with the full benefit of 20/20 hindsight, or because an absent class member first raises particular adequacy objections before the collateral court despite notice and a full opportunity to raise such objections before the certifying court – does not mean that Due Process has been violated. Due Process is satisfied, and classwide preclusion justified, as long as the certifying court "fairly insures the protection of the interests of absent parties who are to be bound by it." *Hansberry*, 311 U.S. at 42; Allen, *supra*, at 1159-60 (assuming fair procedures in the rendering jurisdiction, "no aspect of fundamental fairness to a class member who elects not to opt-out after notice compels" a right to bring a collateral attack on adequacy

grounds).[18]

Considered in this light, a contrary interpretation of the Due Process Clause with respect to adequacy of representation would be quite anomalous. The ultimate value that Due Process seeks to protect in these circumstances is an individual's right to a "day in court." Moore *et al.*, *supra*, § 131.40[1], at 131-130.1. But that value, as the notice example reveals, must occasionally give way to society's greater interest in conclusive resolution of complex litigation through the class action device. Thus, where the class has been adequately notified; where members of the class (and the defendant opposing class certification) have every opportunity and incentive to wage objections to the adequacy of the class representative; where the certifying court expressly rules on the representative's adequacy; and where that ruling is subject to review on direct appeal; the question naturally arises: What possible additional interest is served by protecting the individual's right to relitigate the very same, highly fact-dependent, question on collateral review? And to the

[18] *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996), also supports this procedural interpretation. Although the Court declined expressly to decide respondents' claim that the class was inadequately represented, *see id.* at 378 n.5, other portions of the Court's opinion indicate tacit approval of a procedural-type review of adequacy of representation issues on collateral attack, *see id.* at 378-79 (concluding that state court settlement would be entitled to preclusive effect by reviewing the Delaware courts' discussion of the necessary predicates for preclusion (including notice, opportunity to be heard, and adequacy of representation), rather than making an independent, collateral determination on the merits); *see also id.* at 379 n.5 (noting that class members had advanced an adequacy of representation argument "*in spite of* the [state court's] express ruling, following argument on the issue, that the class representatives fairly and adequately protected the interests of the class") (emphasis added); *Epstein*, 179 F.3d at 649 (*Matsushita* indicates that "broad collateral review of the adequacy of representation (or of the other due process requirements for binding absent class members) is not available").

extent such an interest exists, can the Due Process Clause sensibly be read to demand its vindication, even at the cost of destroying the utility of the class action device?

In sum, this Court's precedents do not require adequate representation *in fact* as a prerequisite to classwide preclusion. As a general rule, conscientious application of Rule 23 will satisfy Due Process because, as demonstrated above, Rule 23 ensures that the certifying court take adequate measures to protect the absent class members' interests. *See Epstein*, 179 F.3d at 649-50 ("properly entertained" class action justifying classwide preclusion is "one in which a certifying court employs the appropriate procedures to determine that the due process requirements embodied in Rule 23 have been met"); Allen, *supra*, at 1160 ("A class member in a Rule 23(b)(3) class action is afforded due process of law by the conscientious application by the court of the requirements of Rule 23 . . . ."). Due Process simply cannot bear the weight that the broad collateral attack rule would place upon it.

C. A Broad Collateral Attack Rule Is Not Necessary To Provide Adequate Protection for Absent Class Members' Interests.

As argued above, neither general principles of *res judicata* nor the Due Process Clause mandate the broad collateral attack rule adopted below. Thus, proponents of that rule ultimately must rest on the notion that collateral redetermination of the certifying court's adequacy determination is somehow necessary to ensure adequate protection of the absent class members' interests. For example, respondents have argued that broad collateral review is necessary as a "check on attempts by overreaching settlements to bind absent claimants." Opp. at 16; *see Epstein*, 126 F.3d at 1242-43 (pointing to potential abusive settlements as an argument in favor of broad collateral attacks), *rev'd* 179 F.3d 641 (9th Cir. 1999). In other words, the rule in favor of broad collateral attacks should be adopted, its proponents urge, because

that rule best serves the values underlying the adequacy of representation requirement.

It is, of course, entirely proper for this Court to evaluate the promised benefits of broad collateral review in deciding whether to adopt it. The doctrine of *res judicata*, after all, is premised on a host of pragmatic considerations that balance an individual's interest in pursuing a lawsuit against the important countervailing interests of finality, conservation of judicial resources, and minimizing inconsistent decisions. *See* Note, *supra*, at 601 n.68 ("The concept of *res judicata*, like that of the class action, reflects a balance among the principles of judicial finality, conservation of judicial resources, and the right of each litigant to a day in court."); *Brecht*, 507 U.S. at 633 (in defining scope of habeas corpus, Court "look[s] first to the considerations underlying . . . habeas jurisprudence, and then determine[s] whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefits of its application on collateral review").

But a complete evaluation of these competing policies requires serious consideration of the substantial *costs* imposed by permitting broad collateral review. And as this Court has concluded on numerous occasions in the habeas corpus context, those costs often outweigh the promised benefits of a broad right to relitigate previously decided questions.[19] Given the direct conflict between a broad col-

[19] *See Brecht*, 507 U.S. at 638-39 (applying cost/benefit analysis to conclude that "harmless error" standard applicable on direct review would not apply on habeas, and that stricter standard requiring actual prejudice would apply); *Teague v. Lane*, 489 U.S. 288, 309 (1989) (rejecting retroactive application of new constitutional rules on habeas review because costs outweigh benefits); *Stone v. Powell*, 428 U.S. 465, 492-95 (1976) (concluding that costs of applying Fourth Amendment exclusionary rule on habeas outweighed its benefits, and that collateral attack challenging introduction of unlawfully obtained evidence was limited to whether state provided an "opportunity for full and fair litigation of a Fourth Amendment claim").

lateral attack right and the interests of finality and classwide preclusion at the heart of the modern class action device, *see supra* at I, it is hard to imagine how the cost/benefit calculation could ever favor adoption of the Second Circuit's rule. *See Moitie*, 452 U.S. at 401 (policies favoring preclusion are "even more compelling in view of today's crowded dockets"); *Martin*, 490 U.S. at 783 n.21 (Stevens, J., dissenting) ("[A] broad allowance of collateral review would destroy the integrity of litigated judgments, would lead to an abundance of vexatious litigation, and would subvert the interest in comity between courts."). In any event, no such showing has been made by the rule's proponents who, as noted, simply ignore its substantial costs.

Even putting aside the costs of such an approach, its supposed benefits are entirely speculative, if not wholly illusory. The crux of the problem is that proponents of the broad collateral attack rule have yet to explain *why* a second adequacy of representation determination is any more reliable or trustworthy than the initial court's adequacy determination, or why such duplicative review would in any way help curb supposed class action abuses. *See* Kahan & Silberman II, *supra*, at 776-86 (arguing that broad collateral attack is not an effective or appropriate method for curbing "plaintiff shopping" or "forum shopping," and that there is no "reason to believe that the determination of (a lack of) adequate representation in a collateral attack is more likely to be correct than the determination of (the presence of) adequate representation in the initial action.").

Indeed, by insisting on a second adequacy determination in order to afford preclusive effect to a class determination, the rule inappropriately assumes that the initial determination by the certifying court is somehow deficient. Commentators supporting a broad collateral attack right have gone so far as

to suggest that the certifying court is not capable of rendering an objective and unbiased adequacy of representation ruling because of the court's own interests in clearing its docket. *See* Woolley, *supra*, at 432-34 (discussing alleged "structural bias" of certifying courts in favor of finding adequacy). Suffice it to say, such a presumption of institutional bias or incompetence is plainly illegitimate.[20] Nor can such a view be reconciled with this Court's description of the certifying court as the protector of absent class members' interests. *See Shutts*, 472 U.S at 809 (noting that, from plaintiffs' perspective a "class action resembles a 'quasi-administrative proceeding, conducted by the judge,'" and that an absent class member is not required to "fend for himself" because the "court and named plaintiffs protect his interests") (citation omitted); *see also id.* at 810 (referring to "continuing solicitude for [absent class members'] rights").[21]

Finally, the supposition that multiple adequacy determinations will improve the reliability of those determinations is simply implausible. A broad collateral attack rule gives class members a powerful incentive to remain silent during the class action proceedings, and to complain about perceived inadequacies of representation only if the relief obtained by the rest of the class later seems inadequate. Such an incentive would deprive the certifying court of information that it needs to reach a fair and complete adequacy de-

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[20] *See Mickens v. Taylor*, 535 U.S. 162, ___, 122 S.Ct. 1237, 1244 (2002) ("[W]e do not presume that judges are as careless or as partial as those police officers who need the incentive of the exclusionary rule.").

[21] *Epstein*, 179 F.3d at 648 (*Shutts* implies unavailability of broad collateral attack rule by "emphasizing that the certifying court is charged with protecting the interests of the absent class members"); Kahan & Silberman I, *supra*, at 268 (rejecting broad collateral attack rule "because federal class action procedures in effect appoint the court as the guardian of the interests of absent class members to ensure adequate representation and the fairness of any settlement"); Note, *supra*, at 602 (same).

termination in the first place. Then again, by relying on the collateral court to compensate for the initial court's supposed deficiencies, the broad collateral rule entrusts a court with no first-hand experience in managing the class proceedings to make a highly fact-intensive, discretionary judgment about the quality of representation in a proceeding that may have taken place (as in this case) many years ago.[22] Thus, the broad collateral attack rule promises *numerous* adequacy of representation findings by multiple courts – *none of which* will be as reliable as the determination that the certifying court could make *if* collateral attacks were limited to a review of the procedures employed by the certifying court. In the words of the leading academic critics of the collateral attack rule, the far better approach is to "Do it once, but do it right." Kahan & Silberman III, *supra*, at 1199.

For all of these reasons, a broad collateral attack rule offers little, if any, tangible benefits to class members or to the integrity of class proceedings. Instead, it promises pervasive uncertainty, and dramatically increased costs, in the class action arena. Because such a rule is not compelled by any legal principle, and because no sound policy supports its adoption, this Court should reject it once and for all.

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[22] Recognizing the discretionary nature of this issue, the courts of appeal apply an abuse of discretion standard when reviewing lower court adequacy determinations. *See* 7A Wright *et al.*, *supra*, § 1765, at 271, 273. The notion (implicitly adopted by the Second Circuit below) that the initial court's adequacy determination would receive *less deference* on collateral review than it would on direct review is, to say the least, extraordinary. *See* Note, *supra*, at 603. In addition, the fact-intensive nature of the adequacy determination seriously undermines the argument that reconsideration by a collateral court increases reliability. *See* Kahan & Silberman II, *supra*, at 789 n.104 (uncertainty "about when the standard of 'adequate representation' has been met underscores the need to limit the availability of collateral attack").

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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APPENDIX A

CORPORATE MEMBERS/ PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M

Allegiance Healthcare Corporation

Altec Industries

American Suzuki Motor Corporation

Andersen Corporation

Anheuser-Busch Companies

Ansell Healthcare, Inc.

Appleton Papers, Inc.

Aventis Pharmaceuticals, Inc.

BASF Corporation

Baxter International, Inc.

Bayer Corporation

Beretta U.S.A Corp.

BIC Corporation

Biro Manufacturing Company, Inc.

Black & Decker (U.S.) Inc.

BMW of North America, LLC

Bombardier Recreational Products

BP Amoco Corporation

Bridgestone/Firestone, Inc.

Briggs & Stratton Corporation

Bristol-Myers Squibb Company

Brown and Williamson Tobacco

Brown-Forman Corporation

Brunswick Corporation

Caterpillar Inc.

Centerpulse USA Inc.

Chevron Corporation

Compaq

Continental Tire North America, Inc.

Cooper Tire and Rubber Company

Coors Brewing Company

Crown Equipment Corporation

DaimlerChrysler Corporation

Dana Corporation

Deere & Company

Delphi Corporation

Dorel Juvenile Group, Inc.

E & J Gallo Winery

E. I. DuPont de Nemours and Company

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Estee Lauder Companies

ExxonMobil Corporation

FMC Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

Georgia-Pacific Corporation

GlaxoSmithKline

GLOCK, Inc.

Great Dane Limited Partnership

Guidant Corporation

Harley-Davidson Motor Company

Harsco Corporation, Gas & Fluid Control Group

Honda North America, Inc.

Hyundai Motor America

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc.

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Mazda (North America), Inc.

McNeilus Truck and Manufacturing, Inc.

Medtronic, Inc.

Mercedes-Benz of North America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motor Sales of America, Inc.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

Otis Elevator Company

PACCAR Inc

Panasonic

Pentair, Inc.

Pfizer Inc.

Pharmacia Corporation

Philip Morris Companies Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Raytheon Aircraft Company

Remington Arms Company, Inc.

Rheem Manufacturing

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Sears, Roebuck and Co.

Shell Oil Company

Siemens Corporation

Smith & Nephew, Inc.

Snap-on Incorporated

Sofamor Danek, Medtronic Inc.

Solutia Inc.

Sturm, Ruger & Company, Inc.

Subaru of America, Inc.

Sunbeam Corporation

Synthes (U.S.A.)

Textron, Inc.

The Boeing Company

The Dow Chemical Company

The Goodyear Tire & Rubber Company

The Heil Company

The Lincoln Electric Company

The Procter & Gamble Company

The Raymond Corporation

The Sherwin-Williams Company

The Toro Company

Thomas Built Buses, Inc.

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Water Bonnet Manufacturing, Inc.

Whirlpool Corporation

Wilbur-Ellis Company

Wyeth

Yamaha Motor Corporation, U.S.A.

Zimmer, Inc.

Supreme Court, U.S.
FILED
DEC 19 2002
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(9)

No. 02-271

IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON, EMILY ELIZABETH STEPHENSON, JOE ISAACSON, and PHYLLIS LISA ISAACSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Defense Research Institute ("DRI") is an organization with more than 21,000 individual lawyer and 400 corporate members throughout the United States. It seeks to advance the cause of the civil justice system in America by ensuring that issues important to the defense bar, to its clients and to the preservation and enhancement of the judicial process are properly and adequately addressed.

These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, through testimony before Congress and state legislatures on select legislation impacting the civil justice system, and by participation as *amicus curiae* on issues of significance to the defense bar and its clients. DRI also provides a national forum for networking by members of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.[1]

SUMMARY OF ARGUMENT

When a defendant enters into a class action settlement, as with all settlements, the most important benefit that the defendant receives, indeed, the only benefit the defendant receives, is that it will no longer be subject to lawsuits or claims based on the issues underlying the class action. Once the trial court approves a class action judgment or settlement and direct appeals are exhausted, the parties, including a defendant, should be able to rely on the final judgment as being truly final. This is the sole benefit of the bargain that inures to the defendant following a class action settlement, which is a contract validated as to its fairness by the court. It is in the defense of this bargained-

1. Pursuant to Rule 37(6) of the Supreme Court of the United States, DRI states that counsel for petitioner and respondent had no part in authoring any portion of this brief. No one other than DRI made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(3)(a) of the Supreme Court of the United States, DRI states that all parties to this case have consented to the filing of *amicus curiae* briefs.

for benefit, not only here, but as much more broadly implicated in virtually all class action settlements, past and future, that *amicus curiae*, the Defense Research Institute, speaks.

The Second Circuit's decision in this case creates a virtually limitless right of so-called "absent class members" to collaterally attack a class action settlement on the grounds of "adequacy of representation."[2] The Second Circuit's flawed analysis ignores certain indisputable facts, including that the incorrectly denominated "absent" class members (a) received fair notice under the law in this case[3]; and (b) had their full and fair opportunity to challenge the adequacy of their representation as class members in the trial court at the time of the settlement approval.[4] Simply put, plaintiffs in the suit below were not "absent" class members, they were class members who derived specific benefits by their inclusion within the class. Their interests were adequately represented despite the fact that they claim otherwise now. Furthermore, the Second Circuit's decision fails to give appropriate judicial recognition to the fact that the trial court had already determined that the class representatives were adequate for the entire class, which determination was twice affirmed on appeal. Essentially, the Court of Appeals decision broadly states that an "absent" class member can challenge the adequacy of representation in a class action if he can articulate any culpable reason, including any changes in the

2. Presumably, the legal principle, to the extent one exists (which *amicus curiae* denies), on which the Second Circuit has created such an unfettered right to attack a final judgment could be applied with equal vigor to any circumstance that might cause someone to second guess a class settlement after it becomes final.

3. As recognized by the Second Circuit's opinion, the notice standard is, "notice 'reasonably calculated to apprise interested parties of the pendency of the action.'" *Id.* at 260.

4. The Second Circuit acknowledges the procedural history of the underlying claims and class action settlement, but fails to accord the careful and correct substantive and procedural undertakings by the trial court any deference. *See*, *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001).

law or facts that would affect the initial class action settlement had it been known then. Under such a rule, no class action settlement, past, present or future is beyond the pale of attack.

Under the Second Circuit's analysis, the finality of every class action settlement, and judgment entered thereon, as approved and finalized by any court, even after direct appeal or after the time for appeal has passed, is subject to an attack based upon virtually any claim that the settlement was unfair or that a class member was not adequately represented. At a time when both the plaintiff and defense bar must increasingly rely on class actions to obtain settlements of claims with multiple plaintiffs, the Second Circuit's ruling undermines and seriously threatens the usefulness of the class action device as a method for resolving such litigation. More importantly, it is antithetical to important legal policy principals, including predictability[5], mutuality and finality.

Although this Court has recently given new guidance as to how the class action settlement requirements are to be analyzed, the Second Circuit's decision goes far beyond this Court's ruling in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591(1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).[6] Despite the

5. Sound judicial policy should be based on judicial economy, fairness, predictability and clarity. *See*, *e.g.*, *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n*, 755 F.2d 366, 372 (D.C. Cir. 1985) (discussing the judicial goals of "clarity, consistency, judicial economy, efficiency and the avoidance of needless expense"); (in ruling on matters, "courts should consider the preservation of constitutional rights, clarity, judicial economy, the likelihood of inconsistent results and possibilities for confusion").

6. *Amchem* and *Ortiz* require a trial court, in certifying a class action, to secure "structural assurance of fair and adequate representation for the diverse groups and individuals affected" by a class action settlement were present and conformed with due process. *Amchem*, 521 U.S. at 626; *Ortiz*, 527 U.S. at 856. This was a somewhat more stringent and specific standard than that which governed the pre-*Amchem* jurisprudence, which required that the settlement be "fair, adequate and

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lack of any cognizable legal policy reason for doing so, the Second Circuit's decision provides a limitless power to collaterally attack a class action settlement by previously bound class members who are willing to do so. All that is necessary is for such class members to claim they were not adequately represented and thus, they were not bound by the class settlement. Under that analysis and approach, defendants who settle class claims literally cannot protect themselves against future litigation after a class settlement is reached. If that is the case, the judicial policy favoring settlement will be completely frustrated.[7] Additionally, if any such a broad collateral attack is to be permitted, which *amicus curiae* steadfastly opposes, sound judicial policy requires that this Court not retroactively apply the class action law of today to the Agent Orange settlement of 1984.

I. The Second Circuit's Expansive Collateral Attack Ruling Shakes The Foundations Of Every Class Action Decision In This Country And Threatens To Undermine If Not Destroy One Of The Civil Justice System's Most Important Tools In Resolving Disputes.

The Second Circuit's decision permits a collateral attack on a class action settlement that has been final for nearly 20 years. Defendants who entered into the settlement of such disputed claims had no reason to anticipate that nearly two decades after they secured collective peace with the courts'

(Cont'd)

reasonable", as a opposed to satisfying ordinary class action certification requirements. *Amchem*, 521 U.S. at 618, 621-22. By extending the class action certification "prerequisites" to settlement class actions, *Amchem* vastly expanded the necessary inquiry at the trial court level. There is no language in either *Amchem* or *Ortiz* that supports retroactive application of these standards, which is the approach embraced by the Second Circuit's decision in this case.

7. *See Bano v. Union Carbide Corp.*, 273 F.3d 120, 129 (2d.Cir 2001); *In re Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000); *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995).

blessing, they would be hauled into court yet again. Years after all the settlement funds have been disbursed, and after petitioners have relied on the trial and appellate courts' approval of the class action settlement to protect them from future "Agent Orange" litigation, two individuals otherwise bound by that settlement have mounted a collateral attack on the original settlement.[8] Respondents simply assert that they were not adequately represented in the original proceeding and as a result they could not be bound to the terms of the settlement. Such claims were pursued despite the fact the Second Circuit approved the original class settlement on two occasions. *See In Re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994). Now, the Second Circuit has inexplicably reversed its earlier course by allowing a collateral attack in the instant case. The Second Circuit now allows a twice-rejected collateral attack on the class settlement, purportedly

8. The Second Circuit, avoiding a discussion of the true result, suggests that plaintiffs are not attacking the class action settlement at all by its assertion, "Plaintiffs do not attack the merits on finality of the settlement itself, but instead argue that they were not proper parties to that judgment. If plaintiffs were not proper parties to that judgment, as we concluded below, res judicata cannot defeat their claims." *Stephenson*, 273 F.3d at 259. Despite plaintiffs' efforts to claim otherwise, they do directly attack the sanctity of the class action settlement and judgment by the district court. In effect, their argument is that anyone otherwise bound by the class action settlement can escape its effect by coming into court alleging that their interests were not adequately protected. Such claims can be asserted under the Second Circuit's analysis irrespective of the merits of such claim, as the Court held –

> We are therefore concerned only with whether they were afforded due process in the earlier litigation. Part of the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts. The claims' ultimate merits have no bearing on whether the class previously certified adequately represented the plaintiffs.

Id. at 261.

based on both newly announced legal standards[9] that did not exist at the time of the original determination.

To fully appreciate the potentially broad application of the decision of the Court of Appeals below, one need only look briefly at the history surrounding this case. The "Agent Orange" controversy was a lightening rod for media coverage from the 1970s through the 1990s. Government use of various defoliants, combined with belated sympathy for Vietnam veterans and the burgeoning environmental movement pushed this issue to the forefront of the collective national consciousness. It is inconceivable that at the time of the initial class action determination in this case that the overwhelming majority of, if not all, Vietnam veterans were well aware of their exposure to "Agent Orange" and had notice of their stake as class members.[10] Those who were not ill in 1984 either knew or should have known that they could be directly impacted by the class action settlement if they developed symptoms they attributed to "Agent Orange." If the "window" of benefits set to expire in 1994 was not enough to protect them or others, they certainly had the opportunity to timely object to the terms of the settlement. Judge Weinstein below, based upon the existing law and facts as known

9. It is not uncommon for parties to regret, for good reason, a past settlement. Often it is because some subsequent event occurs which makes liability, damages or some other pertinent factor clear, when at the time it was not. Presumably, a class member could attack a settlement of a class action by arguing class counsel should have more vigorously pursued certain avenues of discovery, critical liability facts would have been uncovered. This is true despite the fact that the critical information did not become public knowledge until decades after the settlement. There is no end to the mischief the Second Circuit's decision portends.

10. Rule 23 requires, under the circumstances, the best practicable notice be given to class members. The district court provided notice be given to class members by mail, as well as by television, radio and print media over the course of several months from March 1984 through the early summer of 1984. The Second Circuit found that notice to meet the requirements under the rule. *Stephenson*, 273 F.3d at 255.

and knowable, crafted a useful mechanism for future recovery, with a fixed endpoint for benefits that expired on December 31, 1994.[11]

Based upon the information available when the settlement occurred, there was no reason to differentiate between pre-1994 and post-1994 injuries. The year "1994" though arbitrary, was not arbitrarily chosen. The "science" purporting to support plaintiffs' claims was so weak that the trial court judicially concluded that after the 1994 date plaintiff class members would have many ailments that were similar to those asserted on behalf of the class, yet they could not be traceable to exposure to Agent Orange.[12] *See*, e.g., *In Re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1376, 1418 (E.D.N.Y. 1985). In simple terms, the Court concluded that as the class members grew older and experienced

11. The Agent Orange class was composed of

> those persons who were in the United States, New Zealand or Australia Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984 directly or derivatively injured as a result of the exposure.

In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 756 (E.D.N.Y. 1984).

12. The Second Circuit's analysis may be as simple as this, you cannot be bound by a class action settlement if you received no direct payment under its terms. It found that,

> It is true that on direct appeal and on the Ivy/Hartman litigation we previously concluded that there was adequate representation of all class members in the original Agent Orange settlement. However, neither this Court nor the district court has addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlement funds.

Stephenson, 273 F.3d at 258-59.

the maladies that accompany the aging process, the already scant "science" suggesting a causal connection with "Agent Orange" would exceed the outer limits of medical probability.[13] Thus, a final date, which had to be chosen, was set as a limit on recovery for future claims and benefits.

Presumably, the Second Circuit decision was in part a reflection of its belief that respondents receive no benefit from the class settlement. While that should not impact the sanctity and finality of the class action settlement and judgment, it is also simply not true. First, the $35 million set aside for the Class Assistance Program eventually became $71.3 million, and was at least of indirect benefit to them, as is true as to all other class members. Additionally, they were protected class beneficiaries under the terms of the class settlement agreement during the liability window established under its terms. Merely because they did not develop symptoms within the window does not mean they were not protected and did not receive benefit from the settlement. Neither of these benefits would have been available to them except for the terms of the settlement they now attempt to disavow.

By allowing purportedly "absent" class members to collaterally attack the Agent Orange settlement, the Second Circuit has pushed the envelope as to when such a collateral attack may occur over the brink of rationality. Unknowingly, the Court of Appeals has ushered in a judicial construct that places virtually no value on a defendant's right to finality in a class action settlement context. It has also subverted the "important policy interest of judicial economy," which is served by "permitting parties to enter into comprehensive settlements that 'prevent relitigation of settled questions at the core of a class action.'" *C.L. Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1563 (3d Cir. 1994).

13. As Judge Weinstein stated during the hearing in the instant case, in summarizing the lack of scientific data to support plaintiffs' claims, "[h]ad there been no settlement, there would have been no recovery for the veterans."

This Court has long recognized the "vital public interests" served by the finality, clarity, certainty, and predictability that *res judicata* promotes. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). It has defined *res judicata* as, "a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ." *Id. citing Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917). Respondents' alleged rights and interests here do not outweigh or countenance overriding the vital purposes served by *res judicata* and collateral estoppel, which are to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

Respondents seek a potential windfall by attempting to litigate their claims separately from the class to which they belong. This Court has made clear that collateral attacks will not be sanctioned where litigants seek a windfall by claiming they are not bound by a prior judgment. *See id.* at 400-01. The words of this Court spoken years ago in *Reed v. Allen*, 286 U.S. 191, 198-99 (1932), ring as true today and pinpoint why a collateral attack on a class settlement nearly 20 years old by plaintiffs who are within the class should not be upheld:

> The predicament in which respondent[s] fin[d] themselves is of [their] own making . . . . [this Court] cannot be expected for [their] sole relief, to upset the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation — a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.

Moreover, the *res judicata* effect of the court-approved settlement cannot be "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated*, 452 U.S. at 398. A "final judgment" of the scope and magnitude here cannot be collaterally attacked based on subsequent precedent or factual developments without creating "uncertainty and confusion" and "undermining the conclusive character" of court-approved settlements, "consequences which it was the very purpose of the doctrine of *res judicata* to avert." *Federated*, 452 U.S. at 398-99. The time-honored propositions quoted in *Reed* explain why the Second Circuit's decision to apply *Amchem* and *Ortiz* retroactively to permit a collateral attack is unjustifiable:

> . . . all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which, in its terms, embodied a settlement of the right of the parties. It would undermine the foundation of the principle upon which it is based if the Court might inquire into and revise the reasons which led the court to make the judgment. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been susequently [sic] reversed, that is any the less effective as an estoppel between the parties while in force.

Reed, 286 U.S. at 199-200, *quoting Deposit Bank v. Frankfort*, 191 U.S. 499 (1903). By allowing this unprecedented collateral attack two decades after the trial court's final approval of the class settlement, which was twice upheld on direct appeal, the conceptual framework and practical benefits of a Rule 23 settlement are being grossly subverted and perhaps destroyed.

As briefly mentioned, important principles are at stake here, including that of mutuality. A defendant would never be allowed to collaterally attack a class action settlement based on a change in circumstances, whether legal or factual, as the following hypothetical demonstrates. Consider that an airline and

manufacturer of the aircraft involved in a crash agreed, in a class action settlement, to pay benefits to the estates of over 200 individuals who perished. The class action lawsuit alleged a defective fuel tank caused a mid-air explosion of the airplane, resulting in the untimely deaths and seeking actual and punitive damages. Under the impression that there was potential liability for compensatory damages and some potential for punitive damages (while denying same in the settlement papers), the airline and the manufacturer agreed to pay a substantial sum of money to the surviving heirs of each passenger. Many years after the settlement is finalized and approved by the trial court, and the time for direct appeal has passed, new findings surface that call into question the basis for the class action settlement. Simultaneously, a government investigation of terrorism determines that it was not, in fact, a fuel system defect in the ill-fated airplane, but rather, a ground-to-air missile, launched by a terrorist group, which caused the explosion and subsequent crash. Unquestionably, it is now patently clear to all parties that there was no defect in the design, manufacture or maintenance of the plane which caused or contributed to the mid-air explosion. Instead, it was an act of cowardice in an undeclared war by an extreme terrorist group that ended more than 200 lives. Could the airline or manufacturer of the aircraft reopen the class settlement based on this information, seeking to recoup the money mistakenly paid out in settlement? The answer would be a resounding "no." Despite the "unfairness" of such a result, it is the right result.[14]

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14. A "real-life" example of the above airline hypothetical is found in the continuing saga of "breast-implant" litigation. Although numerous cases were settled in the early 1990s, including class action cases, the science regarding the alleged adverse effects of these implants was not well developed. As additional scientific studies were performed, it became clear that rates of immune-related diseases and connective tissue diseases (the primary claim of the plaintiffs in breast implant cases) were not higher for women with silicone breast implants, according to

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Plaintiffs in this case, however, seek to reopen a court-approved class settlement based on a much less convincing argument. Plaintiffs have cast themselves in the role of "absent class members" whose interests were inadequately protected in the 1984 settlement.[15] The alleged "inadequate representation" is based on their effort to spin-doctor their status in 1984 as being different from other potential class member who likewise had not yet suffered any alleged health effects from Agent Orange as of 1984. They were not then nor are they now different than

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studies of the Mayo Clinic and the Harvard Nurses' Health Study. *See* Marian Segal, *"A Status Report on Breast Implant Safety"*, November 1995, FDA Consumer. Shortly thereafter, Judge Pointer, the Coordinating Judge for the Federal Breast Implant Multi-District Litigation, appointed a neutral panel of scientists to determine whether scientific data supported plaintiff's claims that silicone breast implants caused connective tissue disease and immunologic dysfunction. Their report, in summary, concluded on November 30, 1998 that there was no scientific support for such claims. *See, Silicone Breast implants in Relation to Connective Tissue Diseases and Immunologic Dysfunction*, A Report by a National Science Panel to the Honorable Sam C. Pointer Jr. Coordinating Judge for the Federal Breast Implant Multi-District Litigation, pp. 1-8 (November 30, 1998). Would it be appropriate for breast implant manufacturers to seek to re-open past settlements, class action or otherwise, to address this information? "No" is the simple answer yet plaintiffs in this case seek the same type of relief.

15. As noted, plaintiffs, with the Second Circuit's blessing, seek to avoid the application of the doctrine of mutuality by contending they were never bound by the class settlement and judgment (*See* n.8). Apparently, if these two plaintiffs had developed symptoms on or before December 31, 1994, they would be bound and mutuality would apply, but because they did not, they magically are not bound. This approach ignores the fact that the district court had concluded that the 1994 cutoff was fair based upon all that was known and knowable at the time. Now, second-guessing what the trial court found as fair, the Second Circuit creates its own *ad hoc* subclass of persons who manifested no injury by December 31, 1994 and concludes that its new subclass was not adequately represented.

all of the other class members who had not yet developed any identifiable symptoms from exposure. In fact, all individuals who were not ill in 1984 were represented, and a fund was created that would disburse benefits for a 10-year period following the settlement approval.[16] If the plaintiffs below had developed symptoms of any specific illness listed in the settlement before 1994, they would have received benefits. Because they did not develop symptoms in that time-period, they were not eligible to receive direct monetary payments from the class settlement. All class members, including plaintiffs below, did receive the indirect benefit of the monies paid to various Vietnam Veterans' agencies. Plaintiffs were certainly within the group, all "Agent Orange" exposed and injured individuals, which the trial court and Second Circuit found to be adequately represented.[17]

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16. The settlement provided that defendants would pay a total of $180,000,000 into a settlement fund. *Stephenson*, 273 F.3d at 252. $10 million of this fund would indemnity defendants against future state court actions alleging same claims. *Id*. The majority of the $180 million settlement proceeds (75%) were to be distributed to veterans and surviving spouses or children from January 1, 1985 through December 31, 1994. *Id*. at 253. This amounted to roughly $135 million (75% of $180 million). The remaining roughly $35 million ($45 million minus $10 million for indemnity) was to be used to establish the Agent Orange Class Assistance Program, which made grants to entities serving Vietnam veterans and their families. *Id*. Ultimately, the fund paid out $196.5 million. *Id*. at 255. Of that amount, $73.2 million was paid to veterans with injuries on or before May 7, 1984, $52 million was paid to veterans whose injuries manifested after May 7, 1984, and $71.3 million was paid to the Class Assistance Program. *Id*. The $10 million originally set aside for indemnification was transferred back to the district court and was paid as part of the $71.3 million distributed by the Class Assistance Program. *Id*.

17. The Second Circuit concluded that for purposes of the Agent Orange litigation, "injury occurs when a deleterious substance enters a persons body, even through its adverse effects are not immediately apparent." *Ivy/Hartman*, 996 F.2d at 1433-34. Of course, this would include plaintiffs.

Based on subsequent favorable application of the military contractor defense and the complete paucity of evidence supporting a causal link between Agent Orange and health problems, defendants, like the airline in the above hypothetical, could conceivably challenge the 1984 court-approved settlement. Legal principals of finality, however, would bar such a claim. Similarly, plaintiffs' collateral attack on the 1984 judgment should be rejected to appropriately uphold the principle of finality that is at the core of all settlements in our civil justice system. Mutuality, a corollary but no less important legal principle, mandates that the same rule of finality must apply to all parties to a class action settlement. Final judgments approving a class settlement must be given a fair meaning and be extended to protect those who have settled irrespective of whether they are a plaintiff or defendant.

II. The Defendants' Interest In Finality Outweighs A So-Called "Absent" Class Member's Interest In Having Their Day In Court, And To Undermine Such Finality Denies Defendants Due Process Of Law, While Undermining The Usefulness Of Class Action Settlements In Our Civil Justice System.

In a typical non-class action settlement, a defendant receives nothing from a plaintiff other than the legal assurance that it will never again be subject to a claim or a lawsuit for the settled claims in that case. This is the benefit of the bargain which is "purchased" by the defendant through an exchange of consideration, usually a monetary payment. By settling a case, defendant obtains a shield, which forever protects it from any attempt by plaintiff to recover damages against the defendant within the scope of the matters settled.[18] Regardless of the terms

18. Defendants, of course are not claiming that a settlement or judgment is never subject to collateral attack. The exceptions to this rule, not present here, would include cases where plaintiffs can prove fraud, misrepresentation, bad faith, duress, undue influence, or inadequate consideration. The instant case does not involve such

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used to describe this bar, whether it be "*res judicata*" or "collateral estoppel", settlement acts to prohibit future claims that fall within the scope of the settlement, and is the single asset taken by a defendant from any settlement. Without the assurance that the litigation is finally over, a defendant would never engage in settlement talks, much less agree to pay money for nothing.

In a class action context, the bar to future claims and lawsuits is of even greater importance to the defendant. Class action settlements are many times reached early in litigation in an effort to resolve the claims and thus often occur without defendant fully developing liability defenses that might effectively defeat a plaintiff's claims. As is the case in any settlement, but more significantly in settling class action claims, numerous factors are taken into account, including the current law on important issues, the facts relevant to liability and damages, the proclivities of the trial judge and jury pool likely to decide the controversy, the ability of the opposing counsel, and a host of other factors, depending upon the circumstances.[19]

(Cont'd)

allegations so any issues regarding the standards for collateral attack in such egregious situations is not before the Court and need not be addressed.

19. In examining the fairness of the class settlement, Judge Weinstein considered multiple factors. He considered 14 separate categories of concerns expressed by class members, ranging from concerns regarding financial help for those too ill to work to the need to settle now "to get on with life." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 764-72 (E.D.N.Y. 1984). Judge Weinstein also examined the factual problems with the plaintiffs' claims, specifically addressing "evidence of causality," "Scientific Studies on Casuality" and "knowledge of government and defendants." *Id.* at 799-851. He examined government action on the issue, before announcing his approval regarding the fairness of the plan and the "nuts and bolts" of administering the settlement. *Id.* at 851-62. Indeed, it is difficult to imagine a more detailed or thoughtful consideration of fairness issues under the class action rules in existence at the time of Judge Weinstein's decision.

Because of the vast number of individual claims by plaintiffs, defendant generally does not develop case-specific liability and damage evidence as to each and every individual plaintiff prior to a class settlement. Such evidence might lower the value or even eliminate individual plaintiff's claims (particularly in cases involving personal injury). In the class action context, the best claims are lumped in with the worst claims, and though there may be different levels of recovery based on various factors associated with particular class plaintiffs, all plaintiffs receive a negotiated "fair share" of the settlement proceeds paid by the defendant.

Defendants often, as is true here, settle class action cases because to do so is the most efficient means to deal with the possibility of hundreds or thousands of lawsuits.[20] This is true even when liability is, at best, thin. Without the class settlement vehicle, such litigation could drain a corporation of significant financial resources, the vast majority of which would otherwise be paid in legal fees to defend multiple cases or paid in verdicts to a few plaintiffs in certain plaintiff-friendly venues. In reaching a class settlement, a defendant sometimes pays a premium that would not be justifiable based on an individual case evaluation, but it does so because it receives, in return, the assurance that it will never be haled into court for the wrongs covered within the scope of the settlement. Furthermore, plaintiffs are not discriminated against based on factors beyond their control, such as the venue where their individual claim must be pursued.

The nature of mass tort class actions such as this one amplifies not only the public policies that require finality in litigation but also the potential for abuse of the broad new avenue for collateral attack established by the Second Circuit. As one

20. Approximately 123,531 potential class members, including Vietnam veterans, were sent notices of the Agent Orange class settlement. *In re: Agent Orange*, 818 F.2d at 167-68. This notice, in addition to media coverage and other notice required by the Court, resulted in an estimated 240,000 claims by 1987. *Id.*

commentator who has studied mass tort class action settlements, such as the Dalkon Shield IUD litigation, observed:

> Mass personal injury litigation also appears to stimulate a higher rate of claiming than is associated with ordinary personal injuries. . . . The precise rate of claiming in mass torts is indeterminate because no databases record the number of people who have used the products involved in the various litigations and who have been injured. In response to notices of the pendency of Dalkon Shield manufacturer A.H. Robins' bankruptcy, 327,064 plaintiffs filed claims. The court determined that 197,000 plaintiffs demonstrated sufficient evidence of using the Dalkon Shield to merit payment. These numbers represent 13% and 8% respectively of the 2.5 million IUD users in the United States, of whom an unknown but smaller number were actually injured by the Dalkon Shield. Of the 180,000 people reportedly affected by salmonella-contaminated dairy products marketed by Jewel Food Stores, 30,000 — about 17% — filed claims against Jewel Food. These numbers suggest that claiming rates may be at least two to three times higher than for product-related injuries generally. Whatever the overall rate of claiming, the history of mass torts has shown that publicizing the possible link between product use and injuries and the availability of legal remedies — whether through mass media coverage, lawyer advertising, or court-ordered notices — results in a large increase in the number of claims that are filed. . . .

Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1598-99 (1995). In this case, all who were exposed to Agent Orange, including plaintiffs, had a right to benefits under the class settlement. Like

the other mass tort actions cited in the previous example, this one was highly publicized. The "numerosity, commonality, interdependence of case values, scientific controversy, heated emotional atmosphere, and increased propensity to claim," not only increased defendants' exposure to liability but also increased all potential plaintiffs' opportunities to participate, make their claims known and receive benefits. Hensler, *supra*, at 1600.

Currently, parties must meet the *Amchem* and *Ortiz* requirements in order for a class settlement to be approved by the court under the present interpretation of Federal Rule of Civil Procedure 23. Prior to the *Amchem* decision, individual courts crafted divergent standards in their interpretation of federal class action rules, but most often, the individual class action settlements were approved by the district courts and subject to direct appeal, just as this instant case was appealed twice to the Second Circuit.

The Second Circuit's decision in this case goes far beyond any constitutional or statutorily required approach. Likewise, it goes far beyond holdings involving class action law under Rule 23 as promulgated by this Court.[21] The Second Circuit's ruling essentially nullifies the only benefit a defendant receives in a class action settlement, the benefit of finality. By effectively taking from defendants this single but significant benefit, the Second Circuit ignores not only the precedent of this Court, but also ignores the critical importance of finality to the fair and efficient administration of our civil justice system.

Finality, indeed, is a bedrock principle in our civil justice system, and the principle is "administered" by the courts through the doctrine of *"res judicata"*. *See, e.g., Southern Pac. R. Co. v. United States*, 168 U.S. 1, 49 (1897). When parties settle a class action or a judgment is rendered in a class action, the

21. It is assumed without any discussion in the Second Circuit's opinion below that *Amchem* and *Ortiz* are to be given retroactive effect. Not a single word in either of these decisions supports such an application.

Court's determination normally binds absent class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1984). "As a judgment, the settlement and release of claims is a contract that not only is agreed upon by the parties, but also is stamped with the imprimatur of the court with jurisdiction over the parties and the subject matter of the lawsuit." *C.L. Grimes*, 17 F.3d at 1557. The best approach for the efficient administration of justice is to hold that the question of adequacy of representation in a settled class action cannot be reopened via a subsequent collateral attack. *See Epstein v. MCA*, 179 F.3d 641 (9th Cir.) *cert. denied*, 528 U.S. 1004 (1999). If an "absent class member" wishes to challenge a class action settlement, they should either opt out, object to certification or object to the settlement in the trial court. *Id.* Where the claims asserted fall within a court-approved settlement agreement and release, that judgment and contract precludes collateral claims by any class member, even if they object to the settlement, if the court employed "acceptable procedural safeguards," which include notice of the class action plus an opportunity to be heard and participate. *C.L. Grimes*, 17 F.3d at 1557, 1560-61, *citing Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 26, 32-33 (1st Cir. 1991).

Here, the court ordered extensive dissemination of notice by plaintiffs' counsel.[22] Plaintiffs did not object to the class

22. The following excerpt from the Second Circuit's opinion upholding the class settlement describes the notice ordered by the Court: (1) Written notice was to be mailed to (a) all persons who had filed actions in the federal district courts, or had filed actions in state courts later removed to federal court, that were pending in or transferred to the Eastern District; (b) all persons who had intervened or sought to do so; (c) each class member then represented by counsel associated with the PMC who had not yet commenced an action or sought to intervene; (d) all persons then listed on the United States Government's Veterans' Administration "Agent Orange Registry"; (2) Announcements were to be sent to the major radio and television networks, and to radio stations with a combined coverage of at least one half of the audience in each of the top 100 radio markets; (3) Notice was to be published in certain

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settlement, nor did they opt out, and cannot now be heard to complain. Respondents' effort to spin-doctor their status in the case below as "absent" class members is telling indeed. If they were not members of the class bound by the settlement, there would be no need to challenge the class settlement at all. Since they were to be bound by the terms of the class settlement, they were accorded the same rights to object or opt out as any other members of the class.[23] *See* Fed. R. Civ. P. 23. Whether the decision not to opt out or object was a conscious one or whether the result of inadvertence, the result is the same.

In looking at "preclusion rules", (claim and issue preclusion), their "classic" role in the legal system is to "bring litigation to a close." Bruce L. Hay, *Some Settlement Effects of Preclusion*, 1993 U. ILL. L. REV. 21. This "spare[s] both victorious parties and the courts that burden of repeatedly litigating matters already decided." *Id.* The "classic role", however, is not the only important role of issue preclusion. As professor Hay points out, "by limiting in advance the number of times a claim can be litigated, preclusion rules determine a claim's expected value in court to each party." *Id.*

(Cont'd)
leading national newspapers and magazines, in servicepersons' publications, and in newspapers in Australia and New Zealand; (4) A toll-free "800" telephone number was to be obtained and staffed by persons who would provide callers with basic information about the litigation; (5) Notice was to be sent to each state governor requesting that he or she refer the notice to any state agency dealing with the problems of Vietnam veterans. The notice sent to individual veterans . . . informed potential class members of the pendency of the class action and their right to opt out of the Rule 23(b)(3) class. The notice made clear that exclusion could be effectuated only by written request, and an "Exclusion Request Form" was attached to the notice for convenience. *In re Agent Orange Product Liability Litigation MDL No. 381*, 818 F.2d 155 (2d Cir. 1987).

23. If this were not a settlement class, but either a class certified for trial and tried to a defense verdict or had the trial court on motion for summary judgment entered judgment for all defendants, all class members including these plaintiffs, would be bound. Rule 23 contemplates they would be, because if not the rule would be useless.

In other words, if there were no preclusion rules, other factors, such as the relative wealth of the parties and/or their desire for repeated litigation would improperly skew the settlement value of lawsuits. Instead of the merits of the case determining the factors to consider for settlement, the spectre of re-litigation would force the party who was less able to wage war in the courts to give up a substantial amount of "value" during settlement negotiations.[24]

By stripping the mantle of finality from the Agent Orange settlement, the Second Circuit not only imperils closed cases, but also negatively impacts the ability of parties to settle future class action lawsuits based on the merits. The lurking possibility of a collateral attack poisons the well of settlement talks by eliminating a defendant's ability to call any settlement "final."

"Finality" is also enshrined in our jurisprudence in the area of statutes of limitation. This Court has correctly characterized the public policy behind such statutes, stating "[t]he statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim." *See Walker v. Armco Steel Corp*, 446 U.S. 740, 751 (1980); s*ee also Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process.")[25]

24. The author does not believe that the abolition or weakening of claim preclusion would end the settlement of cases, as he is of the opinion parties would rationally sign agreements that would limit re-litigation. Professor Hay believes that the "main effect" of preclusion lies beyond the notion of bringing "finality" to proceedings *Id.* at 24. Rather, the preclusion rules prevent a party from "extract[ing] from her opponent a settlement unrelated to the merits of a dispute." *Id.* at 32.

25. For example, the statutes of limitations for personal injury actions vary widely from state to state, Fla. St. § 93.11(3) (four-year statute of limitations); Cal. Code Civ. Proc. § 340(3) (one-year statute of limitations, recently changed to a two-year statute by S.B. No. 688 (1)); Mo. Rev. Stat. § 516.120 (five-year statute of limitations).

In its analysis below, the Second Circuit, with the hindsight easily developed decades after an event decided that a ten-year window was not enough. Apparently, it believes that the district court got it wrong by not providing for a longer latency period. Interestingly, the Second Circuit has concluded that the trial court got it wrong, but it is just as likely the trial court got it right. For example, it may be that (a) there is indisputable medical evidence of alternate causation for the injuries about which plaintiffs Stephenson and Isaacson now complain, and (b) that it is scientifically certain no one after 1994 could have a medical condition caused by Agent Orange. The broad-based right to collaterally attack a class action settlement envisioned by the Second Circuit exists irrespective of whether there is any interest to protect at all. In other words, even if Judge Weinstein was right, not only on the law but on the science, the collateral attack as embodied in the opinion below is still available.

The opinion of the Second Circuit suggest that the strength of or merits of plaintiffs' claims in no way impact the issues of adequacy of representation and thus the right to pursue a collateral attack.[26]

It is inconceivable that is true. Rather it is unquestionable that adequacy of representation is inextricably intertwined with whether the settlement was fair and adequate, which directly implicates the strength and merits of the class members claims. Here, the trial court analyzed the potential impact of various liability issues such as the government contractor defense and the strength or weakness of the science surrounding the class claims. It is more than conceivable that petitioners paid nearly two hundred million dollars to settle meritless claims which had they been fully defended would have resulted in these plaintiffs and other class members receiving nothing. When class members, including plaintiffs, receive benefits under a

26. *See* n.8.

settlement which probably would not have been available if a decision on the merits had been reached, it is counter-intuitive to conclude they were not adequately represented.

The doctrine of finality dovetails seamlessly with the class action device, which is intended to determine the rights of multiple individuals with respect to similar claims against a defendant, by using an efficient system designed for such purpose. Permitting virtually unlimited collateral attacks, such as the one in this case, seriously "undermine[s]" the very efficiencies sought to be achieved by the class action mechanism." Marcel Kahan & Linda Siberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U.L.Rev. 765 (1998). Indeed, one commentator goes so far as to state that "all class action settlements however generous to the class, however competently litigated and however much the product of adversarial, arm's length negotiations between the parties, would be open to collateral attack in a subsequent forum." Geoffrey P. Miller, *Full Faith & Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silverman*, 73 N.Y.U.L.Rev. 1167, 1189 (1998). For countless legal policy and practical reasons, the Second Circuit's ruling must not be the law.

III. The Second Circuit's Attempt To Retroactively Apply Current Legal Standards And Factual Realities, In Hindsight, To The Agent Orange Decision Flies In The Face Of This Court's Limits On Retroactive Application Of The Law And Further Erodes The Bedrock Principle Of Finality, Upon Which All Settlements Are Built.

Whether these two plaintiffs were "adequately represented" in the class action litigation and global settlement approval, to which they were parties under the class definition, is an issue that goes directly to the merits of the 1983 class certification, the 1984 fairness hearing and the 1987 affirmation of both on

appeal.[27] Rather than viewing plaintiffs' representation in context of 1984 class action law, the Second Circuit has retroactively, and thus impermissibly, applied the *Amchem* and *Ortiz* decisions to support its conclusion that plaintiffs may collaterally attack the class settlement because they claim they were not adequately represented back in 1983, 1984 and 1987. *See Stephenson*, 273 F.3d at 251. ("This appeal requires us to determine the effect of the Supreme Court's landmark class action decisions in *Amchem* . . . and *Ortiz* . . . , on a previously settled class action concerning exposure to Agent Orange during the Vietnam War.").

Amchem and *Ortiz* are seminal opinions carefully delineating the criteria courts must consider and follow when evaluating any class settlement under Rule 23, Fed. R. Civ. P. The *Amchem* holding of this Court was improperly applied retroactively herein below, because

> when this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect **in all cases still open on direct review** and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

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27. If the Second Circuit is right, that plaintiffs here can escape the *res judicata* effect of the settlement and judgment of the trial court, the result will be catastrophic for the defendants. According to the Second Circuit, Plaintiffs were not adequately represented below because of the inherent conflict arising between those who have current injuries, those whose injuries would become manifest after the settlement but before December 31, 1994 and those whose injuries were recognized only after that date. If so, then *all parties* to the settlement could collaterally attack it because none of these groups or subclasses, nor any others that could be dreamed up, were adequately represented since counsel had divided loyalties as between and among each. Thus, any member of the class, whichever group or subclass they find themselves in has the same right to collaterally attack the judgment and seek additional compensation or other relief based upon the allegation of inadequate representation.

Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 96 (1993) (emphasis added). Accordingly, the Second Circuit's retroactive application of *Amchem* and *Ortiz* to sanction this attempted collateral attack contradicts clear, longstanding and well reasoned precedent to the contrary.

An example of the appropriate limits of retroactivity can be found from application of the now well recognized *Miranda* warnings. This Court did not retroactively apply *Miranda v. Arizona*, 384 U.S. 436 (1966) to release every convicted criminal who was not "read their rights" in each case finalized prior to *Miranda*. *See Johnson v. New Jersey*, 384 U.S. 719, 921 (1966) (holding that *Miranda* was to be applied prospectively only).[28] Similarly, *Amchem* should not be applied retroactively to the instant case. To do so would open every previously settled class action to such a collateral attack. Moreover and just as importantly, purported compliance with *Amchem* and *Ortiz* offers no safe haven from the type of collateral attack permitted by the Second Circuit's ruling. As here, a plaintiff simply need allege that they were not adequately represented, despite any and all attempts by the trial court to strictly comply with the holdings in *Amchem* and *Ortiz*. Allowing such collateral attacks is antithetical to the universally recognized legal policies of certainty, mutuality and finality which are essential to the proper functioning and preservation of our civil justice system.

Moreover, there are other compelling legal, equitable and public policy reasons why new legal principles should not apply retroactively in any effort to support a collateral attack on a

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28. This Court stated in *Johnson* that "[r]etroactive application of . . . *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Johnson*, 384 U.S. at 731. Similarly, in the instant case, retroactive application of *Amchem* and *Ortiz* would disrupt finality as to tens of thousands of class members bound by settlements and judgments that were finalized in accordance with due process requirements in existence at the time.

class settlement entered into and approved more than a decade earlier. It is fundamentally unfair to settling defendants and the rest of the class and an affront to judicial economy to permit plaintiffs, who fall within a class bound by a court-approved settlement in a case finally disposed of and well after the time for direct appeal, to launch a collateral attack based on subsequent decisional law. As held by this Court for good reason, "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). Here, the situation is not at all fairly comparable to that which exists when the law changes while a case is still pending. *See Harper*, 509 U.S. at 96-98. Constitutional and policy concerns that compel a presumption of retroactivity in pending cases, such as "the prohibition of selective temporal barriers," are nowhere present here. *See Harper*, 509 U.S. at 97. The chief concern is that parties who are able to negotiate and craft a mutually agreeable settlement have sufficient confidence that it will remain undisturbed[29] once the time for direct challenge has passed.

The Second Circuit's analysis, as noted, widely opens the door to collateral attack by class members. Not only does it apply in this case, and other cases that went to final judgment well before *Amchem* and *Ortiz*, but the Second Circuit's open-door policy on collateral attack would apply equally to future

29. Predictability is critical when the business and legal realms collide. The parties and the court in the Agent Orange settlement did everything by the book and in fact and in part wrote the book, which others have since read and followed. The parties and court had a right to rely on the current status of the law which they did. No one could have predicted in 1984 or 1994 that the Second Circuit would say now that the trial court did it wrong. Especially after twice saying it did it right. To allow retroactive application of *Amchen* and *Ortiz* to this class action settlement, as well as all others previously finalized, will have a chilling effect on litigants' ability and willingness to make critical decisions in litigation, including those involving settlement in reliance on current law. They will never know when they might be whipsawed by newly crafted legal opinions, losing the benefits they bargained for under current law.

actions. The Court's holding will potentially impact hundreds of thousands of plaintiffs and those defendants who have entered into court-approved settlements with them, as is illustrated by a brief review of some relevant statistics on class action filings and settlements. For example, between 1973 and 1996 (before *Amchem* and *Ortiz*), the average number of class actions filed annually in federal courts was approximately 1,568.[30] Federal Judiciary Center researchers have determined that, in four federal district courts, 62% to 100% of certified class actions have settled. *See* Federal Jurisdiction & Procedure, 116 HARV.L. REV. 332 (Nov. 2002), *citing*, Thomas E. Willging, Laura L. Hooper & Robert J. Niemic, An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 60 (1996), available at http://www.fjc.gov. The large percent resolved by settlement is consistent with the federal court policies of encouraging settlement and minimizing protracted, expensive litigation. To allow courts to apply new legal principles retroactively to class actions settled long ago would thwart these policies.

Defendants nationwide, like petitioners here, have justifiably relied on court-approved class settlements based on the law and facts, known or knowable, when they agreed to settle and the court rendered its decision. Petitioners, like other class-action defendants, have spent hundreds of millions of dollars in reliance on the trial court's decision that, based on the applicable legal principles, the settlement was consistent with Rule 23 (as it was interpreted at the time of the class determination) which would preclude further expensive and time-consuming litigation. Petitioners here had no reason to believe that the district court's decision to approve the class settlement was potentially incorrect or could not be fully relied upon as to its finality. In fact, it was not at the time incorrect nor should it be subject to collateral attack long after it became final.

30. *See* Class Action Reports Inc., Statistics tbl.2. at http://www.classactionreports/stats2.htm (reporting federal class actions filed through 2001) (last visited Dec. 11, 2002).

Petitioners expended a substantial amount of money based on these understandings and they should not be forced to relitigate the same claims based on new law or alleged facts that did not exist at the time.

As the number of class actions filed (pending) in federal courts has risen from 1,356 in 1996 to 3,092 in 2001, it becomes even more imperative that current and future defendants who pay substantial or potentially bankrupting amounts of money to settle class claims have confidence that their court-approved settlement will not be subject to collateral attack based on law made long after the case has closed. *See* Class Action Reports Inc., *supra*, Statistics tbl.2. Furthermore, the Second Circuit's willingness to apply the *Amchem* and *Ortiz* analyses to determine the adequacy of representation in this case can only encourage plaintiffs and lawyers, who in hindsight feel "left out," "unfairly compensated," or now wish they had objected, to pursue a judicially approved but potentially disastrous second chance to challenge this and virtually every other significant class settlement. The level of uncertainty created by the retroactive application of new legal principles after the time for direct review has passed places an undue hardship on all who have invested substantial time, resources and money in multi-million and multi-billion dollar settlements, including the courts who have shepherded such class actions through various phases to ultimate resolution. Imagine the chaos that surely would ensue if all class action settlements — past, present or future — were subject to such unlimited collateral attack, as the following nine random examples demonstrate:

• *Cendant Securities Litigation*: $3.525 billion recent settlement with plaintiffs who alleged that Cendant, its predecessor corporation and three of its officers violated the Securities Exchange Act of 1934 by publishing false and misleading financial statements.[31]

31. Stanford Law School Securities Class Action Clearinghouse, at http//secutrities.standord.edu/1002/CD98/ (reporting securities class action settlements) (last visited Dec. 18, 2002).

• *Chrysler Minivan Litigation*: $120,000,000 (1995 dollars) settlement with approximately 3.3 million plaintiffs who alleged that Chrysler minivans manufactured between 1984 and 1995 have defective rear hatch door locks.[32]

• *Bjork-Shiley Convexco-Concave Heart Valve Litigation*: Estimated $215 million (1992 dollars) settlement with 51,000 plaintiffs who alleged that Pfizer, Inc. knew that heart valves sold between 1979 and 1986 could fracture and possibly cause death.[33]

• *EEOC v. Western Electric*: $66 million (1991 dollars) settlement with more than 13,000 plaintiffs who alleged that AT&T denied them pregnancy-related benefits between 1965 and 1977.[34]

• *Albuterol Ltigiation*: $150 million (1995 dollars) settlement with approximately 12,000 plaintiffs after Copley Pharmaceutical announced that its asthma spray was contaminated with bacteria.[35]

• *Airline Ticket Price Fixing*: $458 million (1993 dollars) settlement by seven major airlines with plaintiffs who alleged that these airlines conspired to artificially inflate domestic airline ticket prices.[36]

• *Haynes v. Shoney's Inc.*: $105 million (1993 dollars) settlement with more than 50,000 plaintiffs who alleged Shoney's discriminated against them based on race.[37]

• *Lucent Technologies Phone Leasing Litigation*: Approximately $300 million settlement with plaintiffs who alleged that they paid

32. *See* Vincent, Bruce, *Suit Claims Chrysler Hid Latch Defect*, TEX. LAW., Dec. 18, 1995, at 2; Big Class Action, at *http://www.bigclassaction.com/settlements/automotive.html* (reporting class action settlements and verdicts) (last visited Dec. 18, 2002).

33. *Heart Valve Maker Settles Suit*, CHI. DAILY L. BULL., Aug. 20, 1992, at 1.

34. *Settlements, Awards*, NAT'L L.J., July 29, 1991, at 6, col. 3.

35. *Asthma Spray Settlement Approved*, Nov. 27, 1995, *available in* 1995 WL 4415241.

36. Big Class Action, at http://www.bigclassaction.com/settlements/travel.html (reporting class action settlements and verdicts) (last visited Dec. 18, 2002).

37. *Judge Oks Race Bias Pact*, NAT'L L.J., Feb. 8, 1993, at 21, col.1.

"unconscionably high rental charges" to AT&T and Lucent for residential phones.[38]

• *Pondimin and Redux Litigation*: Estimated $13,200,000,000 settlement by Wyeth with approximately 370,000 plaintiffs who took the prescription diet drugs Pondimin and Redux.[39]

The view of retroactivity embraced by the Second Circuit discounts both the procedural and substantive care surrounding this settlement and defendants' judicially mandated right to peace. The uncertainty created by the possibility of collateral attack after settlement is only compounded and complicated by a rule that encourages that new decisional law be applied retroactively. Complete consideration of the facts, circumstances and public policies implicated by this attempted collateral attack leads to the conclusion that it is manifestly unfair and unjust to deprive defendants of finality in this respect. It is similarly unjust to subject every other defendant who has, or may in the future, enter into court-approved class settlements to similar collateral attacks, after a decision that is otherwise final. Defendants in class actions who compensate the class(es) through a settlement must be able to rest assured that the court's and the parties' legal assessment of the settlement's legitimacy will not be nullified based on subsequent changes in the law. At some point, "final" must mean final; in this case, that time is here and now.

Critical legal principles which have served our justice system well require that it be made crystal clear to all that the unlimited collateral attack on class action settlements encouraged and authorized by the Second Circuit's opinion is not the law.

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38. Big Class Action, at http://www.bigclassaction.com/settlements/consumer.html (reporting class action settlements and verdicts) (last visited Dec. 18, 2002).

39. Big Class Action, at http://www.bigclassaction.com/settlements/pharmaceutical.html (reporting class action settlements and verdicts) (last visited Dec. 18, 2002).

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No. 02-271

IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief, and their letters of consent have been lodged with the Court.*

INTEREST OF *AMICI*

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing over 410 companies writing property and casualty insurance in every state and jurisdiction of the United States. The purposes of AIA are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. AIA is headquartered in Washington, D.C., maintains six regional offices, and retains legislative counsel in every state. Among its other activities, AIA files *amicus* briefs in important cases before state and federal courts that further its purposes.

The National Association of Manufacturers (NAM) — 18 million people who make things in America — is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation representing an underlying membership of more that

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* Counsel for the *amici* were the sole authors of this brief. No person or entity other than *amici* or their members made a financial contribution to the preparation or submission of this brief.

3,000,000 businesses of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

Amici's respective members thus include many of the major industries, businesses and insurers in this nation. Many of *amici*'s respective members thus have in the past been or may in the future be named as defendants in class action litigation. And many either (i) have already entered into and/or been called upon to fund class action settlements; or (ii) will be required to determine whether to do so in the future.

Accordingly, the question presented in this case is of critical importance to *amici*. Class action settlements generally do not require defendants to pay over the settlement funds until the settlement receives final judicial approval on direct review. Once it receives that approval, however, defendants or insurers are required finally to pay over those funds. In return for doing so, defendants typically receive a release to be binding on all class members who had not previously exercised a right to opt out. These defendants and insurers thus have a strong interest in the continued finality of class settlements, lest they be put in the position of having paid what are frequently large amounts of money to the class only to become exposed to renewed litigation years later by members of the class itself.

For this reason, the Second Circuit's decision in this case — which, as detailed below, marks a radical expansion of class members' ability to undo the binding effect of final class settlements through collateral attacks mounted years after the settlement funds had been paid out — is of grave

concern to *amici*. In the years after a class settlement is negotiated and receives final judicial approval, it is hardly unusual for there to be factual or legal developments that cause class members, though affected equally by the settlement at the time it was entered, to derive unequal benefit from it in retrospect. If defendants and insurers cannot rely on the settlement's continued finality in such circumstances, it would be difficult, if not impossible, for them ever to agree to settle major class litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below purports to undo the binding effect of the landmark Agent Orange settlement a full 15 years after that settlement received final judicial approval and petitioners paid $180 million to class members in reliance upon its finality. The decision does so without even acknowledging, much less affording any weight to, petitioners' obviously substantial reliance interest in the settlement's continuing finality. And it does so without affording any weight to the multiple prior judicial determinations (including two such determinations by the Second Circuit itself) that all Agent Orange class members — including those, such as respondents here, who had been exposed to Agent Orange but did not have any manifest disease as of the time of the settlement — were adequately represented.

Instead of paying any heed to the reliance and finality interests at stake when a long-final settlement is subject to collateral attack, the Second Circuit simply equated collateral attack on a final settlement with direct review of a *non*-final settlement under which no performance has taken place. The sum and substance of the opinion below was thus as follows: because this Court's decisions in "*Amchem* and *Ortiz*" — each of which involved direct review of non-final settlements — "suggest" that respondents may not have been adequately represented "in the prior Agent Orange litigation," respondents can necessarily evade the Agent Orange

settlement on a collateral attack. Pet. App. 19a. In other words, the court below apparently assumed that any claim of inadequate representation that might lead to a settlement being disapproved on direct review supplies equal grounds for re-opening that settlement years later on collateral attack.

Worse still, the decision below suggests that, on such a collateral attack, adequacy of representation is to be assessed *in retrospect*, in light of subsequent factual developments that were not known and could not have been predicted at the time the settlement was entered and became final. In this case, for example, the Second Circuit did not identify any conflict of interest between respondents and the remainder of the class that existed at the time the settlement was negotiated and approved in the 1980s. To the contrary, the court below reaffirmed its two prior rulings that all class members who were asymptomatic at the time of the settlement *were* adequately represented — but the decision below now excepts from those rulings class members whose illnesses, as matters *subsequently* developed, happened to become manifest after 1994. Pet. App. 13a & 19a n.7. It obviously could not have been known at the time of settlement that respondents here, as opposed to any of the other then-asymptomatic class members, would not develop symptoms until after 1994: at the time of its negotiation and approval, the settlement thus affected all asymptomatic class members identically. Yet the court below nonetheless allowed respondents to evade the settlement's binding effect because — viewed in a decade and a half of hindsight — it turns out that respondents' medical conditions developed in a way that has allegedly resulted in their deriving less benefit from the settlement than certain other class members whose medical conditions developed differently.

Amici respectfully submit that this radical expansion of collateral attacks on final settlements cannot be sustained. As shown below, the Second Circuit's decision cannot be squared with settled principles regarding the availability and

scope of collateral attacks on final settlements and the sharp distinction between collateral attack and direct review. Moreover, the decision threatens to make it difficult, if not impossible, for defendants and insurers ever to settle major class litigation. In the years after a class settlement is negotiated and receives final judicial approval, it is hardly unusual for there to be factual or legal developments that cause class members, though affected equally by the settlement at the time it was entered, to derive unequal benefit from it in retrospect. If defendants and insurers cannot rely on the settlement's finality in such circumstances — if class settlements are to be a one-way street under which defendants and insurers are to pay what frequently are massive settlement amounts, but absent class members remain free thereafter collaterally to attack the settlement as if the direct-review determination of adequate representation never took place — it would be difficult to see how defendants and insurers could ever justify a decision to settle in the first place.

ARGUMENT

THE DECISION BELOW ERRONEOUSLY EQUATES THE STANDARDS FOR COLLATERAL ATTACKS ON FINAL SETTLEMENTS WITH THOSE FOR DIRECT REVIEW OF NON-FINAL SETTLEMENTS.

Amici fully agree with and join in petitioners' argument that, where a class settlement received final judicial approval on direct review and the class received the procedural protections of Rule 23, principles of *res judicata* preclude absent class members from thereafter collaterally attacking the settlement on grounds of alleged inadequate representation. Where Rule 23's panoply of procedural protections were observed — including the requirement that the courts on direct review determine that all class members were adequately represented — the application of *res judicata* is fully consistent with the requirements of due process:

as the Ninth Circuit put it, "due process does not require collateral second-guessing of those determinations and that review." *Epstein* v. *MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999).

Rather than repeat that argument at length, however, *amici* will focus instead on an additional fundamental defect in the Second Circuit's decision. Even if a collateral attack based on alleged inadequate representation could be mounted here in theory notwithstanding the principles of *res judicata*, the court below applied an entirely wrong standard in assessing that attack. Without any analysis — and certainly without any evident recognition of the very different interests at stake — the Second Circuit simply assumed that the standards for considering adequacy of representation on a collateral attack are identical to those for considering the issue on direct review: the linchpin of its decision is thus that any representation issues that might have led to disapproval of a non-final settlement on direct review under this Court's direct-review decisions in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), automatically and equally supply grounds for the re-opening of a final settlement on collateral attack. Pet. App. 19a.

As shown below, this equation of direct review and collateral attack is supported by neither precedent nor reason. The law is settled that collateral attacks are limited to circumstances where enforcement of a final settlement would cause a deprivation of procedural due process. *See* Section A, *infra*. The Second Circuit's assumption that *Amchem* and *Ortiz* set forth the requirements of due process fails to recognize, in the first place, that those decisions are non-constitutional rulings based on the prophylactic requirements of Rule 23 rather than due process. *See* Section B.1, *infra*. In any event, even if those decisions did set forth due process requirements as applied to *direct* review, this Court has

consistently admonished that the requirements of procedural due process are a balance of *all* competing interests. That balance is very different as applied to the re-opening of a final settlement than to the direct review of a non-final one. Accordingly, even if — notwithstanding observance of the procedural protections of Rule 23 — collateral attacks based on alleged inadequate representation are not necessarily precluded by *res judicata*, such attacks would have to be subject to a far more restrictive standard and be based upon a far more egregious level of inadequate representation than are adequacy-based objections on direct review. *See* Section B.2, *infra*. And viewed against this correct, more restrictive standard, respondents' claim falls well short of the level of egregiously inadequate representation that would be necessary to support a collateral attack. *See* Section C, *infra*.

A. A final settlement can be re-opened on collateral attack only where failure to do so would violate due process.

It is well-settled that the binding effect of a final class settlement cannot be avoided on collateral attack on the basis of any alleged error that might have led to the settlement's disapproval on direct review. To the contrary, this Court has made clear that a class member bound by such a settlement may collaterally attack the settlement only where a failure to re-open the settlement would cause a deprivation of procedural due process.

For example, in *Hansberry* v. *Lee*, 311 U.S. 32, 40-43 (1940), this Court held that absent class members are bound by the outcome of class proceedings unless the ordinary application of *res judicata* would work "a failure of due process." Moreover, *Hansberry* went on to equate collateral attack on a final class resolution with a challenge to full faith and credit (*id.* at 43) — and it is settled law that a judgment "need do no more than satisfy the minimum procedural requirements of the . . . Due Process Clause in order to qualify

for [] full faith and credit." *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982). *See also Silber* v. *Mabon*, 957 F.2d 697, 700 (9th Cir. 1992) (class member's "only hope of success" in seeking collaterally to attack a class settlement on grounds of inadequate notice "would be to establish that the notice procedure deprived him of the procedural due process required by the Fourteenth Amendment").

B. The court below erred in assuming that failure to re-open a final settlement on collateral attack violates due process any time a representation issue might have led to the settlement's disapproval on direct review under *Amchem* and *Ortiz*.

Although the Second Circuit initially paid lip service to this requirement that a putative collateral litigant show that failure to re-open the settlement would work a deprivation of procedural due process (Pet. App. 18a), it offered no explanation why the adequacy-of-representation contention raised by respondents here rose to that level. Instead, the court seems simply to have assumed that the adequacy-of-representation holdings of *Amchem* and *Ortiz* governing direct review are identical to the due process standard governing collateral attacks. That assumption was wrong.

1. *Amchem* and *Ortiz* are not constitutional rulings.

To begin with, nothing in *Amchem* or *Ortiz* suggests that their adequacy-of-representation holdings are based on due process rather than on the prophylactic adequacy protections of Rule 23(a)(4) of the Federal Rules. To the contrary, in each case the Court was careful to describe its holding that the class was not adequately represented as an application of Rule 23. In *Amchem*, the Court thus emphasized that its opinion "focus[es] on the requirements of Rule 23" and specifically described its adequacy-of-representation conclusion as being that the class does not "satisfy Rule 23(a)(4)'s requirement that the named parties 'will fairly and adequately protect the interests of the class.'" 521 U.S. at

622 & n.17, 625. And in *Ortiz*, the Court confined its adequacy holding to "the requirements of structural protection applicable to all class actions under Rule 23(a)(4)" and the "subdivisions of Rule 23(b)." 527 U.S. at 856-57 & n.31; *see also id.* at 865 (Rehnquist, C.J., concurring) (confirming that the Court's opinion is rooted in "the Federal Rules of Civil Procedure"). Indeed, the words "due process" appear nowhere in the section of either opinion containing the Court's holdings that the classes were not adequately represented. *See Amchem*, 521 U.S. at 625-28; *Ortiz*, 527 U.S. at 854-59.*

Nor is it unusual for the Federal Rules of Civil Procedure to supply prophylactic protection that is broader than the due process minimum. For example, in the closely related context of notice in class actions, the requirements of Rule 23 have been recognized to provide more protection than constitutionally required. As summarized by the Newberg treatise:

> [D]ue process sets only minimum standards of conduct. . . . The necessary converse of the Advisory Committee's avoidance of hard analysis of the due process precedent was its promulgation

* It would appear that this limitation of the adequacy holdings to the provisions of the Federal Rules was quite deliberate. (1) In *Ortiz*, three of the seven members of the majority wrote separately to state that they agreed with the majority's holding based on the "Federal Rules" as they presently exist, but that they would "agree entirely with th[e] dissent" if those rules were "revised" — thereby confirming that the decision is *not* a constitutional one. 527 U.S. at 865 (Rehnquist, C.J., joined by Scalia and Kennedy, JJ., concurring). (2) In both *Amchem* and *Ortiz*, the Court called for Congress to create a "national asbestos dispute-resolution scheme" that would benefit present and future claimants. *See* 521 U.S. at 598, 622; 527 U.S. at 821 & n.1. Yet Congress's flexibility in doing so could clearly be hamstrung if the distinction drawn in those cases between presently injured and exposure-only claimants were elevated to constitutional dimensions.

> of notice language more stringent than due process requires. Of even more long-range significance, however, are the Supreme Court's intimations, in *Eisen* v. *Carlisle & Jacquelin* [417 U.S. 156 (1974)], that the phrasing of Rule 23(c)(2) may, at least in some respects, be even more demanding than application of the *Mullane* line of cases would suggest.

2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 8.04, at 8-15 (1992). Likewise, whereas Rules 4(e) and 4(k) generally permit federal district courts to exercise personal jurisdiction only over those defendants that have minimum contacts with the State in which the district court is located, due process in fact permits federal district courts to exercise personal jurisdiction over defendants nationwide. *See, e.g., Robertson* v. *Railroad Labor Bd.*, 268 U.S. 619 (1925); *see also Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 466-67 (2000) (observing that Rule 15 is not "itself a constitutional requirement," although holding that the particular violation of Rule 15 in that case was also a violation of due process).

The threshold flaw in the Second Circuit's decision is thus that *Amchem* and *Ortiz* are *non*-constitutional rulings the claimed violation of which cannot, without more, support a collateral attack on a final class settlement.

2. Even if *Amchem* and *Ortiz* did state the requirements of due process with respect to direct review, the threshold for a due process violation is far higher on collateral attack.

Even if the Court were to hold that the Rule 23 and due process adequacy-of-representation standards are equivalent as applied to direct review — and thus that *Amchem* and *Ortiz* specify due process requirements applicable on direct review of federal and state class actions — it would by no means follow that the due process standard would be the *same* as

applied to collateral attacks. Quite the opposite: the Court's procedural due process cases dictate that inadequate representation must be far more egregious to support a collateral attack on a final class settlement than to warrant due-process-based disapproval of a non-final settlement on direct review. *Cf. Brecht* v. *Abrahamson*, 507 U.S. 619, 633-35 (1993) (in the context of review of criminal convictions, the Court has "recogniz[ed] the distinction between direct and collateral review" and "applied different standards on habeas than would be applied on direct review," including a "less onerous standard" for "review of constitutional error").*

As the Court has made clear, at least where (as here) there is no historical tradition involved, "due process is flexible and calls for such procedural protections as *the particular situation demands*." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) (emphasis added). The Court has thus instructed that, in determining whether a claimed deficiency rises to the level of a deprivation of procedural due process, the courts are to balance all relevant interests implicated by the particular context. Accordingly, the familiar test of *Mathews* v. *Eldridge* balances:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the

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* Thus, in the habeas context — where life, death or lengthy incarceration is at stake — this Court has regularly held that constitutional errors in criminal trials that would have led to a reversal of a conviction on direct review do not rise to the level of constitutional error necessary to permit reversal on collateral review. *See, e.g., Brecht*, 507 U.S. at 634-37 (the "finality" interest underlying the "distin[ction] between direct and collateral review" warrants "applying a less onerous standard on habeas review of constitutional error"; citing cases); *Stone* v. *Powell*, 428 U.S. 465, 489-96 (1976) (violations of Fourth Amendment exclusionary rule ordinarily not cognizable on habeas review); *Wright* v. *West*, 505 U.S. 277, 286-88 & n.3 (1992) (opinion of Thomas, J.) (citing cases).

> procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976). Where, as here, the issue involves "disputes between private parties rather than between an individual and the government," the third *Mathews* factor is modified so that "principal attention" is paid to the interests of other affected private parties "with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protection." *Connecticut* v. *Doehr*, 501 U.S. 1, 11 (1991).*

The relevant interests — and hence the *Mathews* balance — are very different in the context of a collateral attack seeking to re-open a settlement years after it became final and the defendants paid out the settlement funds than in the context of direct review of a non-final settlement. We will address the *Mathews* factors in reverse order.

a. The interests represented by the third *Mathews* factor — which as applied here include the reliance and finality interests of defendants, as well as the finality interest of the judicial system — support a much higher threshold for due process violation on collateral attack than on direct review. These interests are obviously impacted to an immensely greater degree where a final settlement is sought to be

* Although the *Mathews* test was originally developed in the context of challenges to procedures afforded in connection with administrative action, the Court has since expanded its application into "a general approach for testing challenged . . . procedures under a due process claim," *Parham* v. *J.R.*, 442 U.S. 584, 599 (1979), and has applied it in a variety of private civil litigation contexts. *See, e.g., Doehr*, 501 U.S. 1 (private use of civil attachment procedure).

re-opened than where a non-final settlement, under which no party has performed, is on direct review.

The settlement at issue here, like class-action settlements generally, did not require petitioners to pay over the settlement funds until the settlement received final judicial approval on direct review. Once it received that approval, however, petitioners were required to pay the $180 million in settlement funds, in return for which they were entitled to a release to be binding on all class members (such as respondents) who had not previously opted out. The settlement funds, of course, are long gone and cannot be retrieved. Petitioners thus have an overwhelming reliance interest at stake in the continued finality of the settlement, lest they be put in the position of having paid a massive amount of money to the class only to become exposed to renewed litigation years later by members of the class itself.

Moreover, the judicial system expended enormous resources over almost two decades in bringing the massive Agent Orange litigation to conclusion through the class settlement and in administering the settlement after it became final. The judicial system's interest in finality is thus at its highest with respect to attempts to re-open that litigation and undo the settlement on collateral attack. In fact, the Second Circuit itself expressly so recognized in rejecting a prior adequacy-of-representation-based collateral attack on this settlement, determining that "society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from [the additional protection sought], whose benefits here are conjectural at best." *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993).

The law fully recognizes the strength and legitimacy of these reliance and finality interests in avoiding collateral relitigation of ostensibly final judgments. For example, the entire purpose of "res judicata and collateral estoppel [is to] . . . encourage reliance" on matters as they have already been

adjudicated (*Allen* v. *McCurry*, 449 U.S. 90, 94 (1980)), and to further the courts' interest in "the conclusive resolution of disputes within their jurisdiction." *Kremer*, 456 U.S. at 466 n.6. Likewise, much of this Court's habeas jurisprudence is predicated on a recognition that "[t]he strong interest in preserving the finality of judgments . . . must be overcome before collateral relief can be justified." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977); *see also Brecht*, 507 U.S. at 635.

b. The second *Mathews* factor — focusing on the "risk of an erroneous deprivation" and the "probable value" of the additional procedural rights being sought — also warrants a far higher threshold for due process violation on collateral attack. Before any collateral attack to a final settlement approved pursuant to Rule 23 can ever be mounted, class members will have had full opportunity to raise adequacy-based objections on direct review and the courts will have determined on that review that the class was adequately represented. The risk of an erroneous deprivation — the risk that the class was not adequately represented — is clearly at its low end in such circumstances, where the contrary has already been determined by the courts on direct review. Certainly the risk is far lower than in the context of direct review, where adequacy of representation has yet to be passed upon.

For similar reasons, the Court has frequently recognized in analogous contexts that, where collateral review is sought of issues previously determined on direct review, the threshold for constitutional error is far higher than it was on direct review. This Court's habeas cases thus regularly state that "[w]hen the process of direct review — which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari — comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Brecht*, 507 U.S. at 633; *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983). Accordingly, this Court has "appl[ied] a less

onerous standard on habeas review of constitutional error," rejecting an array of collateral challenges that raise constitutional errors that would have led to reversal on direct review. *Brecht*, 507 U.S. at 637; *see* p. 11n, *supra*. Indeed, even in capital cases, once a conviction has been sustained on direct review the defendant is stripped of the presumption of innocence and faces "extraordinarily high" barriers to any attempt on collateral review to seek reversal of the death sentence on grounds of "actual innocence." *Herrera* v. *Collins*, 506 U.S. 390, 398-400, 417 (1993).

The same principle underlies the full faith and credit cases. Defendants ordinarily have the right to resist the application of full faith and credit where the judgment is the product of a procedural due process violation or the rendering court lacked jurisdiction. However, where the due process or jurisdictional question was actually determined by the rendering court, the question is generally *not* subject to collateral relitigation. Instead, "the general rule [is] that a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee* v. *Duke*, 375 U.S. 106, 111 (1963).*

Moreover, the insight of these cases — that the risk of error and the probable value of further proceedings is lower where the pertinent issue has already been determined on direct review — applies with particular force to the Agent Orange settlement. In the course of direct review and the prior attempted collateral attack, the district court and the

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* *See also Rosen* v. *National Labor Relations Bd.*, 735 F.2d 564, 571 (D.D.C. 1984) (administrative adjudication not subject to collateral challenge even where the person aggrieved was not a party to the adjudication and only had "virtual or proxy representation" because "the likelihood that a further collateral hearing will reduce the risk of erroneously adverse judicial [finding] is quite small").

Second Circuit did not just find that the class was adequately represented in general. Instead, they expressly considered and rejected claims of inadequate representation that (i) were very similar to the claim raised by respondents here, and (ii) were brought by absent class members who at the time were situated identically to respondents. On direct review, objectors who — like respondents — were asymptomatic at that time argued that they had not been adequately represented. And on the prior attempted collateral attack, class members who were asymptomatic at the time of the settlement but developed symptoms thereafter maintained — much like respondents — that they were not adequately represented in the absence of the "designation of a subclass of future claimants." *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d at 1436-37. The Second Circuit determined otherwise. *Id.*; *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 167 (2d Cir. 1987). Where the courts have assessed — and rejected — virtually the identical claim of inadequate representation now being raised, the "risk of an erroneous deprivation" and the "probable value" of re-opening the final settlement are all the more miniscule.*

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* To the extent the Second Circuit's elaborate attempt to distinguish its prior decisions (Pet. App. 13a) was an attempt to address this point, the effort is wide of the mark. Our point here is that the risk that the class was not adequately represented is at its lowest when the courts previously considered a very similar claim of inadequate representation to that now being made — whether or not the prior claim can, if read in the most parsimonious possible manner, be distinguished from the current one.

In any event, the Second Circuit's attempt to distinguish the prior adequacy claims from that now being raised by respondents fails on its own terms. The asymptomatic objectors on direct review were in exactly the same situation at that time as were respondents: each of them had been exposed to Agent Orange, had no present symptoms and had no way of knowing whether their symptoms would first appear after 1994. Their challenge to inclusion within the same

(Cont'd)

c. As to the first *Mathews* factor, respondents no doubt have an "interest" in being able to undo the settlement's binding effect — although *amici* would seriously question the strength of that "interest" in view of the Second Circuit's repeated conclusions that the tort claims of Agent Orange plaintiffs are "speculative" and have a "dim prospect of success" on the merits. *In re Agent Orange*, 996 F.2d at 1437. For a number of reasons, however, that interest — whatever its strength may be in general — is far less weighty in the context of collateral attack on a final settlement than in the context of direct review.

First: As the Court has recognized, "[d]irect review is the principal avenue for challenging a [judgment]." *Brecht*, 507 U.S. at 633. Here, respondents had full opportunity to object to the settlement on direct review — indeed, the settlement's provisions regarding class members whose illnesses would first develop after 1994 were clear at the time of direct review and were in fact highlighted by the district court at that time. *See* Pet. App. 5a. Having bypassed the opportunity to object on direct review, respondents' "interest" in being able to launch a collateral attack years later should be assigned considerably less weight in the due process balance. This is particularly true given that respondents' "interest" in voiding the settlement was fully represented on direct review by other class members who did object, who were situated identically to respondents at the time they did so, and who raised very similar arguments to those that respondents now put forth. *See* pp. 15-16, *supra*.

(Cont'd)
class as those with then-manifest injuries thus fully embraced and represented respondents' position here. Indeed, if the Second Circuit were correct that *Amchem* and *Ortiz* "indicate" that the class should have been divided into subclasses of "present and future claimants" (Pet. App. 19a), respondents would have been assigned to the *same subclass* as both these asymptomatic objectors and the class members who brought the prior collateral attack.

Second: The particular grounds on which respondents base their inadequate-representation claim renders their "interest" in being able to re-open the settlement even less cognizable. Respondents do not allege that the settlement disadvantaged them on the basis of any fact that was known or predictable at the time the settlement was negotiated and approved. To the contrary, it obviously could not have been known or predicted *which* class members — whether respondents or anyone else — would first develop symptoms after 1994. As of the time it was entered, the settlement thus affected all asymptomatic class members identically.

Instead, respondents argue that they were not adequately represented because — as matters *subsequently* developed — it turned out that their illnesses happened to become manifest after 1994. In essence, respondents are alleging "inadequate representation by hindsight": that, although they and other class members were affected equally by the settlement at the time it was entered, subsequent factual developments have caused them to derive allegedly unequal treatment in retrospect. With the benefit of hindsight, class members disgruntled by the share of settlement funds which they are ultimately eligible to collect can almost always fashion arguments along these lines. Accordingly, if such arguments were sufficient to cause the re-opening of final class settlements — depriving defendants of the benefit of their bargain and exposing them to renewed litigation long after they have paid out the settlement funds — it will be for the most part impossible for defendants to settle class actions in the first place. Unless that is to be the case, class members' "interest" in re-opening a settlement based on "hindsight" arguments of this nature must be given very little weight.

C. Respondents cannot show the egregious level of inadequate representation that would be necessary to support a collateral attack.

For the foregoing reasons, collateral attacks based on inadequate representation — to the extent they are not generally barred by *res judicata* — must be limited to cases in which the representation was egregiously inadequate or the requisite due process protections were not afforded on direct review.

Hansberry v. *Lee*, the sole case in which this Court has permitted a collateral attack on a final class resolution, illustrates such a case. There, a state court had entered a class-action judgment (i) finding that a restrictive racial covenant had been executed by the necessary percentage of landowners in the area in question and (ii) holding that all members of the class were bound by the restrictive covenant. 311 U.S. at 39. The purported "class" comprised persons whose interests were directly at odds concerning the very subject matter of the litigation: it included both landowners who "sought to secure [the covenant's] benefits by enforcing it" and landowners who wished to "challenge the validity of the [covenant] and resist[] its performance." *Id.* at 44. The class judgment, moreover, was procured only by means of "a false and fraudulent stipulation" that the necessary percentage of landowners had executed the covenant. *Id.* at 38. Finally, the state courts on direct review made no determination regarding — and do not appear even to have addressed — adequacy of representation.* In such circumstances, this Court held that class members who wished to challenge the covenant had not been adequately

* *See* Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 Sup. Ct. Rev. 219, 266 (1996) (the state court in the initial action in *Hansberry* "made no finding on the adequacy of representation").

represented by class members who wanted to see the covenant enforced, and that due process required re-opening of the judgment on collateral attack. 311 U.S. at 44-45.

But there is obviously a world of difference between the collateral attack permitted in *Hansberry* and that brought by respondents here.

- Unlike in *Hansberry*, the Agent Orange class members did not have conflicting interests regarding the very subject matter of the litigation: all had exposure to Agent Orange; all had resulting tort claims against the product's manufacturers; and all therefore had a common interest in maximizing the recovery from the defendants. Instead, as discussed above, respondents' claim to have been inadequately represented is simply a hindsight-based complaint that subsequent developments have led the settlement to be less favorable to them than may have appeared at the time the settlement was entered.
- Unlike in *Hansberry*, the final judgment arose — not from a fraudulent stipulation — but from a good-faith settlement that the courts approved as fair and pursuant to which petitioners paid $180 million to the class in legitimate reliance upon the settlement's binding effect.
- Unlike in *Hansberry*, class members received the full panoply of procedural protections under Rule 23, including the courts' careful determination on direct review (and indeed, on the prior collateral attack) that the class was adequately represented.

In short, in *Hansberry*, (i) the class comprised persons whom one would more expect to find on the *opposite* sides of litigation rather than jointly represented within the same class; (ii) the class judgment was procured by fraud, leaving its proponents with no legitimate reliance interest in its enforcement; and (iii) the class received virtually no procedural protections and no judicial scrutiny of adequate

representation on direct review. The polar opposite is true here. If this final settlement can nonetheless be re-opened on a collateral attack such as that brought by respondents, class action settlements could hardly be called "settlements" at all.

CONCLUSION

For the foregoing reasons, the Second Circuit's judgment should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

DOW CHEMICAL COMPANY, ET AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

All of the parties acknowledge that respondents Stephenson and Isaacson, like hundreds of thousands of other class members purportedly bound by the judgment at issue in this case, had not yet manifested an Agent Orange-related injury at the time the court approved the Agent Orange settlement. Thus, in amicus curiae Public Citizen's view, before answering the questions presented in the petition, this Court should consider the following jurisdictional question:

Does the judgment approving the Agent Orange settlement lack binding effect on respondents on the ground that claims of future, contingent injury do not meet Article III's case-or-controversy requirement?

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INTEREST OF AMICUS[1]

Public Citizen is a public advocacy, lobbying, and litigating organization with 135,000 members nationwide. It realizes that individuals, acting alone, often cannot obtain legal redress for large-scale corporate or government misconduct. Therefore, Public Citizen works to strengthen the class action device as an efficient means to secure justice. However, class actions can be abused to the detriment of class members. Thus, Public Citizen has represented objectors in more than 30 nationwide class action settlements in which the named representatives and their lawyers were inattentive to the needs and divergent interests of the absent class members whom they were supposed to represent.[2] Public Citizen opposes the result sought by petitioners here because it would eliminate the right to obtain collateral review of a class judgment, which is both a key check on abuse of the class action and a necessary adjunct to its legitimacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Beneath petitioners' arid, incomplete discussion of the facts of this case and their uncritical praise for class action

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[1]Letters of consent to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amicus states that no party had any role in writing this brief and that no one other than amicus made a monetary contribution to its preparation or submission.

[2]*See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315 (3d Cir. 2001); *In re Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000); *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1271 (S.D. Ohio), *aff'd*, 102 F.3d 777 (6th Cir. 1996); *see generally* Henry Reske, "Two Wins for Class Action Objectors," 82 A.B.A. Journal 36, 37 (June 1996) (highlighting Public Citizen's work representing objecting class members).

efficiency lies the real question presented in this case: May a class action judgment release "future" claims of persons unaware of those claims, and then deprive the unwitting class members, when or if they ever develop injuries, of their first and only opportunity to be heard by denying collateral review? The answer is no.

To begin with, future claims cannot be released in a class action because such claims do not present Article III "cases" or "controversies" over which a federal court may exercise power. Just as fundamentally, unless collateral review is available to determine whether future claims meet the constitutional requirements for binding absent class members to a judgment—or to review class actions for other endemic abuses—absent class members will have fallen victim to a judicial catch-22: Their right to due process will have been decided in an action that itself may have deprived them of that process. Because class action courts are uniquely able to decide rights in the absence of the litigants they bind, collateral review is a more important protection for absent class members than it is for other litigants; indeed, it is a key mechanism for ensuring that the efficiency benefits of class actions are not achieved at the expense of the absentees.

The Agent Orange class action attempted to litigate claims on behalf of the estimated 2.4 million Vietnam veterans exposed to Agent Orange, an herbicide used to defoliate the Vietnamese countryside during the war. *See In re Agent Orange Product Liab. Litig.*, 597 F. Supp. 740, 756 (E.D.N.Y. 1984). When filed in 1979, it was the largest mass tort class action ever. *See* Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 4-6 (Belknap Press 1987). In its first four years, the suit lumbered slowly towards trial. *Id.* Chs. 3-6. Then, in October 1983, Judge Jack Weinstein was assigned to the case, and, to put it mildly, he immediately put

the case on a fast track to settlement. *See id.* at 115-22. He imposed a grueling trial schedule and, on the eve of trial—when plaintiffs' counsel were shockingly unprepared to present their case—he summoned the parties to the courthouse for weekend-long, marathon settlement discussions that resulted in an agreement at 3 a.m. the morning of trial. *Id.* at 115-24, 140-42, 143-68.

In the negotiations, defendants demanded, and got, a release from all future tort claims by Vietnam veterans for Agent Orange exposure. *Id.* at 153. The fact that the Rule 23(c)(2) class notice—which stated that only those "who were injured" by exposure to Agent Orange were included in the class, *Agent Orange*, 100 F.R.D. 718, 732 (E.D.N.Y. 1983)—had already been mailed, and the opt-out deadline had expired, gave the court little pause. The subsequent Rule 23(e) settlement notice stated in passing that the claims of "persons who have not yet manifested injury" would also be released, but no new opt-out period was provided for hundreds of thousands of new class members. *Agent Orange*, 597 F. Supp. at 865.

The settlement provided class members a small amount of compensation for each year between 1971 and 1994 in which they could demonstrate "total disability." *Agent Orange*, 611 F. Supp. 1396, 1410 (E.D.N.Y. 1985). Veterans who manifested injury after 1994, like respondents here, received nothing. *Id.* at 1417. The settlement also provided lump-sum payments for families of veterans who had died from diseases that may or may not have been Agent Orange-related. *Id.* at 1410.

Some veterans, including those currently uninjured, were aware of both the suit and these provisions, and many of them objected to the settlement. Many, however, had no inkling of the suit, much less the ramifications of the

settlement. Respondents Isaacson and Stephenson were among those who knew nothing of the suit. More than a decade after the settlement was reached, they both developed injuries of the kind associated with Agent Orange exposure. In 1996, Mr. Isaacson was diagnosed with non-Hodgkins lymphoma, and, in 1998, Mr. Stephenson was diagnosed with multiple myeloma. When each filed suit, petitioners asserted that the suits were barred by the res judicata effect of the *Agent Orange* class judgment.

A. Article III. At bottom, this case illustrates why including future tort claimants in class action settlements violates the Article III requirement that federal courts adjudicate only "cases" or "controversies." Future, contingent tort claims do not meet the requirements of Article III, and permitting federal courts to adjudicate them undermines the adversarial system that Article III preserves and on which the legitimacy and accuracy of judicial decision-making depends. Moreover, complex mass-tort class actions present particular dangers that courts will overreach, both because of the often well-intentioned desire to provide a broader, quasi-legislative solution to problems burdening the legal system, and because it is precisely in the class action context—where procedural protections replace litigants' adversarial and individual participation—that individual due process is most vulnerable.

B. Res Judicata and Class Actions. At its core, the res judicata problem here is similar to the Article III problem. Class actions are peculiarly subject to abuse because the affected parties are represented vicariously, by representatives whose interests may diverge from those whom they are duty-bound to represent. In such situations, collateral review must be available for putative class members to determine the res judicata effect of a class judgment. It would violate constitutional norms to do as petitioners propose—either

entirely eliminate collateral review for absent class members or substantially defer to the class court's Rule 23(a) determinations—because that would afford absent class members fewer due process rights than other litigants.

Indeed, given the institutional dynamics of class actions and the potential for abuse, absent class members' rights deserve greater scrutiny on collateral review. Denying collateral review to future claimants effectively eliminates their rights before they ever have the chance to exercise them. Thus, if class members' due process rights are to be protected—and if this Court is to adhere to the maxim that the class action is a procedural device that cannot alter substantive rights—collateral review must be available in full force. Only such review can guarantee that the efficiencies of class actions are achieved "'without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (quoting Advisory Comm. Notes to Fed. Rule Civ. Proc. 23).

ARGUMENT

I. THE ABSENT CLASS MEMBERS' THEN-NONEXISTENT CLAIMS DID NOT PRESENT ARTICLE III CASES OR CONTROVERSIES.[3]

A. Article III Requirements

Article III of the Constitution confines federal judicial power to "Cases" or "Controversies." This limit preserves the separation of powers by confining courts to their proper adjudicative function and preventing advisory opinions that would intrude on the legislative and policy making functions that the Constitution assigns to Congress and the President. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring). Article III also enhances the quality of decisionmaking by ensuring the "'concrete adverseness which sharpens the presentation of issues.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Article III's standing requirement also promotes the effectiveness and legitimacy of the adversarial legal system by ensuring that litigants serve their proper role. *Lujan*, 504 U.S. at 560. The

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[3]In prior cases, the Court avoided the question whether future claims present Article III cases or controversies by resting its decisions on non-constitutional grounds. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999); *Amchem*, 521 U.S. at 612. Constitutional avoidance is not possible here, since all questions presented are constitutional. Moreover, the Article III question is logically first and most basic, because if the *Agent Orange* court never had Article III power to adjudicate the supposed "claims" of the vast uninjured class, it never had power to issue orders that could have res judicata effect on that class. *See Steel Co. v.Citizens for a Better Environment*, 523 U.S. 83, 94-96 (1997) (federal courts must satisfy themselves of Article III authority before deciding merits); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

"personal stake" litigants must have in the outcome of litigation, *Shutts*, 472 U.S. at 804 (citation omitted), guarantees that they have adequate incentives to assert their claims and defenses, providing the court with the information and issues on which to base a decision. These incentives also ensure that parties will act to protect their own rights. It is this personal stake in litigation that makes the adversary legal system a fair and effective means of determining individual rights and thus legitimizes the court's power to render binding judgments.

Article III requirements apply no differently in class actions than in ordinary litigation. The class action is a procedural device that cannot alter the separation-of-powers commands of Article III any more than it can alter or confer substantive rights. *Amchem*, 521 U.S. at 613; *Ortiz v. Fibreboard* Corp., 527 U.S. 815, 865 (1999) (Rehnquist, C.J., concurring); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 331-32 (1980); *see also Ortiz*, 527 U.S. at 831 (Rule 23 must be interpreted within Article III constraints) (citing *Amchem*, 521 U.S. at 615). Accordingly, a court may neither certify a class nor render a class judgment with respect to persons whose claims are outside its Article III power.

Cabining the judicial branch and promoting effective and legitimate adjudication serves particularly important needs in the class action context. Article III must be read to require that the claims before the court, especially those of nonparticipating members, constitute cases or controversies appropriate for adjudication. Class actions already lack some of the adversity of nonclass suits because absent members do not prosecute their own claims. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) (Becker, J.); *Mars Steel Corp. v. Cont'l Illinois Nat'l Bank*, 834 F.2d 677, 678 (7th Cir. 1987) (Posner, J.). This problem is particularly acute in the settlement context.

Amchem, 521 U.S. at 621. Adherence to Article III requirements can ensure that even if the class action suit involves less adversarial testing than the usual suit, it does not lack adversity altogether. *E.g., Ortiz*, 527 U.S. at 823-26 (rejecting settlement based on agreement reached before suit filed); *Amchem*, 521 U.S. at 601-02 (disapproving settlement "not intended to be litigated"); *see also Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 636-38 (3d Cir. 1996) (Wellford, J., concurring) (noting named plaintiffs never intended to litigate their claims), *aff'd sub nom. Amchem*, 521 U.S. 591 (1997).

Morever, even absent class members with real injuries are not expected to closely monitor their class representatives or their attorneys, nor do most have incentives for doing so. *See General Motors*, 55 F.3d at 785; *Mars Steel*, 834 F.2d at 681. Class members who have no real case or controversy may not even suspect that a suit exists that may affect their rights. Just as importantly, even when absentees are aware of the suit, if they have no real injuries, they have even fewer incentives than ordinary class members to care about the result. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 96 Colum. L. Rev. 1343, 1351 (1995) (future contingent claimants are "rationally apathetic" to suit because they probably will not develop injury). Similarly, if the claim is merely hypothetical, absentees will also lack the ability to make rational decisions about their rights. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (due process rights hinge on *meaningful* opportunity to exercise those rights). Thus, permitting class courts to adjudicate non-cases, before the putative litigants can be expected to exercise their rights meaningfully, undermines another important function of Article III by preventing litigants from playing their necessary adversarial role.

Class actions may also present particular temptations for courts to render decisions that exceed their judicial power. Defendants will press for the broadest classes and releases possible, and plaintiffs' counsel have incentives to offer a broad release in exchange for a settlement providing significant attorney's fees, but low value for the class. *See In re American Reserve Corp.*, 840 F.2d 487, 490 (7th Cir. 1988); *Mars Steel Corp.*, 834 F.3d at 681. Courts also face pressures to approve settlements, including lack of judicial resources to adjudicate massive cases involving many thousands of plaintiffs, the momentum settlement creates, and the fact that once parties agree to settle, the court is deprived of the adversarial relationship needed to produce information about the merits of the settlement. *Amchem*, 521 U.S. at 621; *Mars Steel*, 834 F.2d at 680; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051, 1122-33 (1996); Coffee, *supra*, 96 Colum. L. Rev. at 1347-48. Courts have succumbed to these pressures most readily in the mass-tort context, where broad releases of liability permit the court to rid itself of a "litigation albatross[]." *General Motors*, 55 F.3d at 799.

As Judge Becker has pointed out, however, "turning the federal courts into a mediation forum [is] a result inconsistent with their mission and limited resources." *Id.* It is also inconsistent with Article III. *Georgine*, 83 F.3d at 635-38 (Wellford, J., concurring); *see also Kremens v. Bartley*, 431 U.S. 119, 136 (1977) (court may not exceed Article III jurisdiction even if decision of issue would be "'convenient for the parties and the public'") (quoting *Ashwander*, 297 U.S. at 345) (Brandeis, J., concurring)); *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 14 F.3d 726 (2d Cir. 1993) (rejecting asbestos company's suit to erect remedial scheme for all current and future asbestos claims as beyond court's Article III power). This Court resisted the temptation to permit courts to exceed the statutory limits of their power in the *Ortiz* and

Amchem class actions, and it should do so here as well with respect to Article III limits.

B. Future Claimants Lack Standing.

Future tort claims cannot be adjudicated by courts because, before a claimant has any actual injury, they do not meet Article III standing requirements.

The "irreducible minimum" of constitutional standing requires that 1) the plaintiff suffers from a concrete injury in fact; 2) the injury is fairly traceable to the alleged conduct of the defendant; and 3) the injury is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560. The most glaring problem with "future" (have not occurred) and "contingent" (may never occur) tort claims is that they fail the injury-in-fact test: the invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *See id.* Future claims, such as those of Mr. Stephenson and Mr. Isaacson, do not meet any aspect of this test.

At the time of the settlement, neither Mr. Stephenson nor Mr. Isaacson had any injury that they attributed to Agent Orange. Whether they would develop any injury, much less when or what type of injury, was entirely unknown. Their potential injuries were therefore not "concrete" in either a "qualitative [or] temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Moreover, just as respondents' injuries were not "actual" in 1984, neither were they "imminent." *Lujan*, 504 U.S. at 560. To be "imminent," there must be a sufficient degree of certainty that the injury will exist in the future to eliminate the possibility the court will decide "a case in which no injury will have occurred at all." *Id.* at 564 n.2. In *Agent Orange*, there was no assertion that class members would certainly develop injury, much less that they would do so

quickly. In short, "[a]llegations of possible future injury do not satisfy the requirements of Article III." *Whitmore*, 495 U.S. at 159.

Although some of the class complaints asserted claims for the "increased risk" of developing injuries in the future due to exposure, these claims did not provide standing for future-injury claimants. On the generous assumption that an "increased risk" claim presents a current injury at all—and therefore might confer standing—such a claim is confined to the probability of manifesting disease at the time of the complaint. That kind of claim does not (because it cannot) allege the particular injury that claimants will (or will not) suffer in the future. *See* Coffee, *supra*, 96 Colum. L. Rev. at 1435. Put differently, a past injury, for which there may be standing to pursue relief, does not supply standing for the distinct claim of hypothetical future injury. *See City of Los Angeles v. Lyons*, 461 U.S. 461 U.S. 95, 111 (1983). Therefore, any "increased risk" claims did not provide standing for the court to adjudicate respondents' future claims based on conjectural injuries from Agent Orange.

Respondents' future tort claims also lacked redressibility at the time of the suit. *Whitmore*, 495 U.S. at 155. A damages award for a future-injury claim would be entirely speculative. *See Anderson v. Mt. Clements Pottery Co.*, 328 U.S. 680, 688 (1946) (no recovery for speculative damages claims); *In re UNR Industries, Inc.*, 725 F.2d 1111, 1120 (7th Cir. 1884) (Posner, J.) (estimating damages for future tort claimants "would be a quixotic undertaking far beyond the realistic boundaries of judicial competence"). Redressing claims based on "risk" alone would vastly overcompensate those who never developed injury, and vastly undercompensate those who did. *See Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985). Moreover, an agreement to settle

a class suit that alleges only the increased risk of injury in the future, but does not allege the actual occurrence of those injuries (because they have not yet occurred), does not redress those unalleged injuries. *See* Coffee, *supra*, 96 Colum. L. Rev. at 1435; *cf. National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 17-18 (2d Cir. 1981) (class action settlement may release claims not asserted in the complaint only if both sets of claims share the same factual predicate); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1563-64 (3d Cir. 1994) (same).

The intangibility of future, contingent claims presents quandaries for courts and litigants that underscore the Article III problem. Preventing the courts from adjudicating future claims fulfills the core purpose of the case-or-controversy requirement: It limits courts to the consideration of concrete disputes in which the facts are fully developed and the injuries fully understood. Otherwise "every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim." *Schweitzer*, 758 F.2d at 944 (future tort claims not cognizable even under broad definition of "claim" under Bankruptcy Code). Put otherwise:

> If intangible and contingent injuries . . . amount to a concrete injury-in-fact sufficient to confer standing, then it would seem that few meaningful barriers remain. Indeed, on this basis, a settlement class action today might also resolve, consistent with Article III, the future claims of all citizens in the United States who have been exposed to secondary tobacco smoke.

Coffee, *supra*, 96 Colum. L. Rev. at 1426. Relaxing standing requirements to include contingent claims would therefore invite a flood of litigation. *See North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991) ("Plaintiffs would be

tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it") (Posner, J.). In the modern class action context, this rush to the courthouse would involve not actual plaintiffs but their counsel, egged on by defendants seeking a prospective fix to a problem that, in our system of separated powers and federalism, is the province of Congress or the state legislatures. Coffee, *supra*, 96 Colum. L. Rev. at 1349 ("once a sword for plaintiffs," defendants have discovered mass tort-class actions provide unique means of minimizing liability by obtaining release of future claims).

This Court has twice struck down legislative settlements that attempted to bind massive classes of future damages claimants. *Ortiz*, 527 U.S. 815; *Amchem*, 521 U.S. 591. To prevent class action dynamics from undermining the limits and effectiveness of the judicial branch, the Court should hold that the approval of a class action settlement of future damages claims exceeds the bounds of Article III.

II. COLLATERAL REVIEW IS A CONSTITUTIONALLY REQUIRED CHECK ON THE CLASS ACTION DEVICE.

A. Class Certification Under Rule 23 Is Not A Proper Substitute For Collateral Review.

Under the principle of res judicata, parties may not relitigate issues that were litigated, or could have been litigated, to final judgment in a prior suit. *Richards v. Jefferson Co.*, 517 U.S. 793, 797 n.4 (1996). That principle is limited in two important respects: First, to be bound by the judgment, a person must have been a proper party to the judgment or in privity with a proper party. Second, that person must have received due process in the initial suit, including notice and an opportunity to be heard. *Id.*; *Shutts*, 472 U.S. at 807 (legal

claim is constitutionally recognized property interest that cannot be extinguished without due process).

The law has established the means by which the res judicata effect of a judgment must be tested. First, the preclusive effect of a judgment is determined not in the original proceeding but in a subsequent proceeding. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Shutts*, 472 U.S. at 805. Therefore, the res judicata inquiry is, by definition, a retrospective one, because it is performed in a collateral proceeding after judgment becomes final. Second, the preclusive effect of a judgment is determined with respect to a specific party; that is, persons challenging the res judicata effect of a judgment, such as respondents here, are entitled to a determination as to whether the original proceeding accorded *them* due process. *See Restatement (Second) of Judgments* § 42, cmt. a (1982); 7B Wright, Miller & Kane, *Federal Practice and Procedure: Civil* § 1789 at 245 (2d ed. 1987); 3B *Moore's Federal Practice* § 23.11 (3d ed. 1982); *Newberg on Class Actions* §§ 16.24-25 (3d ed. 1992).

These well-established principles apply with full force to class actions. Absent class members are not named parties, but they may be bound by a class judgment if they were adequately represented and otherwise received due process. *Hansberry*, 311 U.S. at 40-42; *see also Shutts*, 472 U.S. at 808, 811-12. Thus, in class actions, the res judicata analysis for class actions merely substitutes "adequate representation" for the "proper party" requirement. *See Hansberry*, 311 U.S. at 41; *Shutts*, 472 U.S. at 808. Putative class members are therefore permitted to challenge the res judicata effect of judgments in collateral proceedings on due process grounds, just as non-class litigants have always been able to raise due process challenges to res judicata. *Richards*, 517 U.S. at 798-99; *Shutts*, 472 U.S. at 811-12; *Hansberry*, 311 U.S. at 40-43; *see also Twigg v.*

Sears, Roebuck & Co., 153 F.3d 1222, 1226 (11th Cir. 1998); *In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760, 767 (3rd Cir. 1989); *Nathan v. Rowan*, 651 F.2d 1223, 1227 (6th Cir. 1981) (citing cases); *Taunton Gardens Co. v. Hills*, 557 F.2d 877, 878 (1st Cir. 1977); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Tex. L. Rev. 383, 384 n.3 (2000) (citing cases).

Petitioners argue that respondents may not challenge adequate representation and due process because the *Agent Orange* court already determined these issues under Rule 23, so this Court must either disallow the challenge entirely or defer to some extent to the class court's Rule 23 determinations. Yet res judicata principles dictate that, despite overlap between res judicata questions and the Rule 23(a) inquiry, collateral review is a personal due process right separately afforded every litigant.

Rule 23 determinations are part of the class court's initial judgment. The question here is not the merits of the class judgment in general, but whether it violates due process to apply the judgment to respondents. If the two questions were the same, the class court would determine the preclusive effect of its own judgment, a notion expressly disavowed by the drafters of Rule 23. Rules Adv. Comm. Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 106 (1966) (Rule 23 "does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action"). "It gets the cart before the horse to reject, as barred by judgment, an effort by the absent class members to show that they were not properly brought into the [] case and therefore are not affected by the judgment." *Kamilewicz v.*

Bank of Boston Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc).

B. Class Members' Rights To Collateral Review Are Critically Important Because Of The Special Dangers Of Class Actions.

Class actions provide an efficient means of adjudicating large numbers of similar cases by replacing the participation of class members with representative parties and notice. This lower level of individual involvement makes it difficult to ensure that absentees' interests are adequately protected. In addition, the dynamics of class action settlements present potential for abuse that will fall most heavily on absentees because of their less-involved status. Thus, collateral review is necessary to prevent the abuse of class members' rights. Far from weakening the vitality of the class device, that review provides needed procedural protection for absentees and therefore increases the effectiveness and legitimacy of class actions themselves.

Absent class members generally do not monitor their cases because their claims are relatively low in value or because they believe that the named representatives will champion their interests. *See General Motors*, 55 F.3d at 784; *American Reserve Corp.*, 840 F.2d at 490; *Mars Steel*, 834 F.2d at 681. Despite the formal requirement to do so, even the class representatives do not generally monitor the class suit, making the lawyers "close to the real parties in interests." *Mars Steel*, 834 F.2d at 679; s*ee also Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1309 & n.7-8 (3d Cir. 1993); *American Reserve Corp.*,

840 F.2d at 490.[4]

In turn, the interests of the class and of plaintiffs' counsel are not always well-aligned. *Mars Steel*, 834 F.2d at 681. This situation presents the potential for abuse of class members' rights. "Because absentees are not parties to the action in any real sense, and probably would not have brought their claims individually, attorneys or plaintiffs can abuse the suit nominally brought in the absentees' names." *General Motors*, 55 F.3d at 785 (citation omitted).

In light of these dynamics, the court overseeing a class action has heightened obligations, in particular towards absentees. *Id.* (court "plays the important role of protector of the absentees' interests, in a sort of fiduciary capacity"). However, because the natural objectors—the putative class members—are absent, the court is often deprived of information it needs to play its fiduciary role. *E.g., Amchem*, 521 U.S. at 62; s*ee also American Reserve Corp.*, 840 F.2d at 490 (courts monitor class actions "often at great cost in time and even then imperfectly"). This problem increases the likelihood that the judgment, even if meritorious generally, will be unfair to specific class members about whom the court knows nothing.

The potential for abusive class actions is exacerbated in the settlement context. When plaintiffs' counsel and defendants broach the possibility of settlement, the interests of plaintiffs' counsel may shift to obtaining large fees in

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[4]As discussed in Part I.A. above (at 8), future claimants particularly lack incentives to monitor a class suit (if they know about it at all) because their "claims" have little value to them unless and until they become concrete injuries. *See* Coffee, *supra*, 96 Colum. L. Rev. at 1432 (future claimants present the "extreme example of lawyers operating without clients").

conjunction with the settlement, in exchange for which they may be willing to sell out the class. *American Reserve Corp.*, 840 F.2d at 490; *Mars Steel*, 834 F.2d at 681. Defendants are interested in obtaining the cheapest settlement possible in exchange for the broadest release of liability. *General Motors*, 55 F.3d at 778. Thus, a class action may become "a vehicle for collusive settlements that primarily serve the interests of defendants—by granting expansive protection from law suits—and of plaintiffs' counsel—by generating fees gladly paid by defendants as a quid pro quo for finally disposing of many troublesome claims." *Id.; see also Bolger*, 2 F.3d at 1310; *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (noting the inherent "danger that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees"); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 677 (1986) (class actions are "uniquely vulnerable to collusive settlements that benefit plaintiffs' attorneys rather than their clients").

Added to these seemingly inexorable forces, courts are likely to approve settlements because they are subject to abuse-producing pressures of their own. To begin with, a settlement agreement deprives the court of any adversity between the parties (a dynamic already weakened in the class action context) as it prepares to evaluate the settlement. *Amchem*, 521 U.S. at 621. Lead parties bent on approval, moreover, "can be expected to spotlight the settlement proposal's strengths and slight its defects" in presenting it to the court. *Bolger*, 2 F.3d at 1310. To the extent the settlement lacks objectors, courts are deprived of any "independently derived information" about the settlement. *General Motors*, 55 F.3d at 803.

Moreover, courts face enormous institutional pressures to approve even defective settlements. Settlement creates its own momentum that the court may well be reluctant to derail. *Mars Steel*, 834 F.2d at 680; Koniak & Cohen, *supra*, 82 Va. L. Rev. at 1122-33. Courts also have incentives of their own to approve settlements, most notably clearing their dockets of complex cases. *General Motors*, 55 F.3d at 790. A recent study found that courts are pressured to favor settlement by crowded dockets, scarce judicial resources, and a general institutional preference for settlement. Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 91-92 (Rand Institute for Civil Justice 2000). Another major empirical study found that courts approve 90 percent of proposed settlements without substantive changes. Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts*, 58 (Fed. Judicial Center 1996). As Professor Coffee put it, "[Courts'] deferential attitude is probably best expressed by one recent decision which acknowledged that '[i]n deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial.'" Coffee, *supra*, 86 Colum. L. Rev. at 714 n.121 (quoting *In re Warner Commun. Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985)); s*ee also General Motors*, 55 F.3d at 805.

As a result of these institutional problems, which affect absentees most heavily, a procedural check in the form of collateral review is crucial to ensure absentees' rights are not the high price of class action settlements. "If the court's most powerful sword (namely, its authority to reject the settlement in a class action) will typically remain in its scabbard, the quest for accountability must look to other weapons and remedies." Coffee, *supra*, 96 Colum. L. Rev. at 1348. This Court has recognized that the threats to absentees' rights that class settlements represent demand "undiluted, even heightened"

scrutiny of the Rule 23(a) criteria "designed to protect absentee rights." *Amchem*, 521 U.S. at 620; *see also Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) (quoting *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring) (terming as "'most significant' the potential unfairness" of certifying an overbroad class)). Because settlement dynamics affect the rendering court's ability to perform a searching Rule 23 due process review, collateral review is of similarly heightened importance for protecting absentees' constitutional rights. *See General Motors*, 55 F.3d at 799 (it would erode due process protections to allow lower standards for settlement classes in light of "the hydraulic pressures confronted by courts adjudicating very large and complex actions").[5]

Collateral review provides a check on these potential abuses for several reasons. First, a collateral court is not subject to the same dynamics—the "hydraulic" settlement and approval pressures—that affect the parties and court in the class action itself. Further, a collateral proceeding provides individualized review and a chance for absent members, such as respondents, to assert their own rights. Numerous commentators have stressed that determining the preclusive effect of a *class* judgment can only be done with reference to a *specific* party. *Restatement (Second) Judgments* § 42 cmt. a (1982); Wright & Miller, *supra*, § 1789 at 244-45; *Newberg on*

[5] These concerns are particularly apt here because "[t]he mass tort class action occupies a polar position at the extreme end of the continuum in terms of its relative vulnerability to abuse and exploitation." Coffee, *supra*, 96 Colum. L. Rev. at 1349. Professor Coffee argues that the potential for abuses of future claimants is so intrinsic to mass-tort class actions that such class actions amount to a "new technology" that defendants have learned to use to minimize their liabilities "before [future claimants] even learn of their injuries." *Id.* at 1350.

Class Actions § 16.24 at 16-130-31.

Moreover, a judgment that is generally beneficial may nevertheless be unlawful as to particular class members, which may be revealed only when its application to those individuals is considered. This principle comports with the rule that the overall fairness or benefits of a settlement cannot replace individual fairness. *Amchem*, 521 U.S. at 621; *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1133-37 (7th Cir. 1979) (each sub-group of class is entitled to fair settlement). The retrospective nature of the res judicata inquiry provides additional facts that similarly sharpen the ability of the court to properly adjudicate an individual class member's rights. Particularly in large mass-tort cases, parties may lack information at the time of settlement about the number and types of claims. Medical science may be similarly undeveloped, and the effects of toxins may themselves take years to be revealed. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 Boston U. L. Rev. 659, 667 (1989); *see also* Coffee, *supra*, 96 Colum. L. Rev. at 1422-33 (impossibility of estimating future claims or predicting future effects of toxins prevents courts from rendering accurate judgments in mass tort class actions that include future claimants).

Petitioners argue that absentees' due process rights cannot be afforded collateral protection because permitting meaningful collateral review would render the class action device useless and would discourage, if not prevent, defendants from settling class suits. Quite the contrary. Collateral review affirmatively supports the legitimacy of the class action process. As Judge Becker has put it:

> Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme. Rather than

threatening the vitality of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if subsequent courts find them to be inadequately represented is integral to the constitutionality of the class action procedure. . . .

Moreover, as the Court explains in *Shutts*, it is partly up to the defendant to safeguard the interest of the absent plaintiffs. If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the class action mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

In re Real Estate, 869 F.2d at 769-70 (citations omitted). The efficiencies of class actions do not support giving them automatic preclusive effect. Rather, for the reasons stated above, those efficiencies may be attained only by adhering to, not ignoring, the time-honored and critical protection afforded by collateral review.

III. THE *AGENT ORANGE* JUDGMENT IS NOT RES JUDICATA AS TO RESPONDENTS.[6]

A. The Named Plaintiffs Did Not Adequately Represent Future Claimants.

The representation of respondents was inadequate because none of the named plaintiffs possessed future claims. At its core, "adequate representation" requires that the representatives possess the same claims and the same injuries as the members they represent, so that in asserting their own interests they also act in the absentees' interests. *See Gen. Tel. Co.*, 457 U.S. at 156 (citing *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)); *National Super Spuds*, 660 F.2d 9. Put another way, named plaintiffs may represent the class only to the extent that their claims are typical or representative. *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 692 (1961). Thus, a class judgment is binding only as to those particular claims for which the class member was adequately represented. *National Super Spuds*, 660 F.2d at 17; *see also Cooper v. Fed. Reserve Bank*, 467 U.S. 867 (1984). As Judge Friendly explained in *National Super Spuds*, if the rule were otherwise, named plaintiffs might be "willing to throw to the winds" the claims of other class members that the named plaintiffs did not also possess. *Id.* at 17 n.6. Here,

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[6]The following discussion draws on Rule 23 precedents as well as on cases based on the constitutional due process standard for adequacy of representation. Rule 23(a)'s class certification criteria overlap substantially with constitutional due process, and they are meant to provide at least the constitutional minima. *E.g.*, Rules Adv. Comm. Notes, 39 F.R.D. at 107. Many cases interpreting Rule 23 criteria have expressly relied on constitutional standards. *Ortiz*, 527 U.S. at 831 (Rule 23 must be interpreted in light of Article III constraints) (citing *Amchem*, 521 U.S. at 613); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974); *In re Real Estate*, 869 F.2d at 766.

the class representatives all had presently manifested injuries rather than future claims. Therefore, respondents were not adequately represented with respect to their future claims.

Second, even if the *Agent Orange* named plaintiffs had asserted future injuries, they still could not properly have represented respondents. The Court has held that only legally cognizable claims may be considered for the purposes of certifying a class under Rule 23. *Amchem*, 521 U.S. at 622-23 & n.18.[7] Future claims are not legally cognizable because, for the reasons stated above, they are not justiciable under Article III and could not have been "'raised in courts of law as part of an actual or impending lawsuit.'" *Id.* at n.18 (quoting *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring in part and concurring in judgment)). Thus, the "futures" claimants in *Agent Orange* could never have been adequately represented. *See id.; see also* Coffee, *supra*, 96 Colum. L. Rev. at 1435 (future claimants' interests differ to extent of differences in injuries they actually develop); Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 Colum. L. Rev. 397, 408 (1985) (speculative nature of future claims makes it impossible to identify future claimants' interests).

Aside from the claims of the named *Agent Orange* plaintiffs, significant conflicts existed *within* the "sprawling" absentee class, *Amchem*, 521 U.S. at 622, because the certification grouped together present and future claimants.

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[7]The Court made this statement with specific reference to "predominance" and "typicality" criteria, *Amchem*, 521 U.S. at 622-23 & n.18, which are "guideposts for determining whether . . . the named respondent's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence" and "therefore also tend to merge with the adequacy-of-representation requirement." *Gen. Tel. Co.*, 457 U.S. at 157 n.13.

This Court has recognized that the interests of present and future claimants are, by their nature, in conflict. *Id.* at 623-26. "Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.* at 626. As in *Amchem*, moreover, present and future claimants here were not separated into subclasses with separate representation, and accordingly were not adequately represented. *Id.*

The structure of the *Agent Orange* settlement further reveals that these intraclass conflicts were not conjectural. *Id.* at 626-27 (considering "structural" fairness of settlement to determine whether class members received adequate representation). Compensation under the settlement was available only if a veteran manifested injury between 1971 and 1994. *Agent Orange*, 611 F. Supp. at 1417. Thus, the presently injured received compensation (including compensation retroactive to 1971), while future claimants could obtain compensation, in decreasing amounts, only if they manifested injury before 1994. Future claimants who manifested injury after 1994, like respondents, received nothing. These significant differences reveal that there were conflicts of interests among the different types of claimants in the class. *Amchem*, 521 U.S. at 627.

Judge Weinstein certified the class based on the common issue of causation, 100 F.R.D. at 724, and in approving the settlement found that class members, including future claimants, had a common interest in settlement because of the uncertainties of medical science and the poor chances that plaintiffs would prevail on that common issue. 597 F. Supp. at 795, 857. But *Amchem* rejected the rationale that future claimants all "'have a strong interest in ensuring that recovery for all the medical categories be maximized because

they may have claims in any, or several categories.'" 521 U.S. at 608 (quoting 878 F. Supp. at 726-727 (E.D. Pa. 1994)). As the Court explained, if a "shared uncertainties" rationale provided the necessary commonality for representation purposes, then any intangible claim, or even the lack of a claim, would suffice. *Amchem*, 521 U.S. at 623-24 (exposure alone not enough for commonality among class members). Moreover, settlements are intended to permit parties to escape—for a price—the uncertainties of trials. It is therefore no answer to say that class members are equally well-off when forced to exchange their claims for a settlement that likely will pay them nothing; after all, they are giving up their right to a jury trial that, although it *may* pay them nothing, may also produce a substantial recovery.

In sum, respondents did not receive adequate representation because no named plaintiffs shared their interests and the undivided absent class encompassed groups of claimants with opposing interests. The fundamental conflict within the Agent Orange class will be present in every settlement that attempts to release future damages claims of as-yet uninjured class members.

B. Respondents Did Not Receive Adequate Notice Because They Were Unaware That They Had Anything To Lose, Depriving Them Of Other Due Process Rights.

The class judgment is not res judicata as to respondents for another reason: They did not receive notice of the class suit as due process requires. *See Shutts*, 472 U.S. at 811-12; *Mullane*, 339 U.S. at 314 (notice is a "fundamental requirement of due process in any proceeding which is to be accorded finality"); *Eisen*, 417 U.S. at 176-77.

Notice must be "of such nature as reasonably to convey

the required information." *Mullane*, 339 U.S. at 314. The class notice failed to meet this standard with respect to respondents because it did not by its terms include future claimants in the class. The initial court-approved Rule 23(c)(2) notice, mailed in March 1984, *Agent Orange*, 597 F. Supp. at 756, defined the class as those "who were injured" by exposure to Agent Orange while serving in the military in the Vietnam War. 100 F.R.D. at 732. Class members were required to opt out by May 1, 1984. *Id.*

This class definition was not intended to include future claimants. Only during the settlement negotiations that concluded on the morning of trial, May 7, 1984, did defendants demand to be released from future claims, and plaintiffs' counsel and the court agreed. Schuck, *supra*, at 153-54. The court stated that it would "interpret" the class definition to include future claimants. *Id.* The subsequent Rule 23(e) settlement notice stated that veterans who had been exposed to Agent Orange but had "not yet manifested injury" would now be included in the settlement and their future claims would be released. *Agent Orange*, 597 F. Supp. at 865. Thus, future claimants were not provided with a Rule 23(c)(2) notice regarding class certification or provided the right to opt out, depriving the judgment of any preclusive effect as to the new "futures" class. *Shutts*, 472 U.S. at 811-812; *accord Ortiz*, 527 U.S. at 846-47; *see also General Motors*, 55 F.3d at 791-92 (court that expands class must provide new class members notice and opportunity to opt out).

Due process also requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. This standard requires that personal notice be provided to all class members who can be identified through reasonable effort.

Eisen, 417 U.S. at 173-75. Under these principles, respondents should have received personal mailed notice. The government knew the identity of all Vietnam veterans, a large portion of whom had been exposed to Agent Orange. *E.g., Agent Orange*, 506 F. Supp. 762 (E.D.N.Y. 1980) (Pratt, J.) (suggesting personal notice would be mailed to all Vietnam veterans). There is no reason, other than cost, *Eisen*, 417 U.S. at 177 (cost not a permissible consideration), that individual notice could not have been mailed to all veterans rather than only those individuals who had already filed claims with the court and individuals on the government's Agent Orange registry. *Agent Orange*, 100 F.R.D. at 729. Publication notice was provided in only a handful of national publications, *id.*, and was thus hardly "reasonably calculated" to reach the 2.4 million exposed U.S. veterans and their families scattered across the country. As a result, neither Mr. Stephenson nor Mr. Isaacson was actually aware of the class suit while it was proceeding, or at any time before they discovered their own injuries and filed their own suits, because they did not receive constitutionally adequate notice.

Whether they were actually aware of the suit, however, is not determinative, for as class members with no manifest injury, respondents could not have been provided with meaningful notice. *E.g., Barry v. Barchi*, 443 U.S. 55, 66 (1979) (opportunity to be heard must be at *meaningful* time and in *meaningful* manner). The Court suggested in *Amchem* that "futures" class actions present potentially incurable notice problems, and this case illustrates why that is so. Even if uninjured veterans were aware of the suit, they still had no "claim" and therefore no reason to believe that they had rights being adjudicated that required protection. Given that courts will not normally accord a legal remedy for speculative damages claims, *see Anderson*, 328 U.S. at 688; *In re UNR Industries*, 725 F.2d at 1120, courts should not expect class

members to make important decisions with regard to future injuries, including placing a value on them for the purposes of evaluating settlement. *See* Coffee, *supra*, 96 Colum. L. Rev. at 1351. As this Court put it:

> Many persons in the exposure-only category may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may or may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Amchem, 521 U.S. at 628.

Here, the value of any potential claim was particularly difficult to evaluate given the uncertainty of medical science, the range of diseases potentially caused by Agent Orange, the different severities of injury, and long latency periods, not to mention the unknown risk of developing injury at all. That class members may be unable, through no fault of their own, to make decisions intelligently demonstrates that they were unable to exercise their rights in a meaningful way. As *Mullane* counsels, "when notice is a person's due, process which is a mere gesture is not due process." 339 U.S. at 315. In sum, because respondents could not be provided with constitutionally adequate notice, they did not receive due process and are not bound by the class judgment.

CONCLUSION

The decision of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:
DOW CHEMICAL COMPANY, MONSANTO CHEMICAL, ET AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

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No. 02-271

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Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPNDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Consent of the parties to the filing of this brief has been filed with the Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions.

The Seventh Amendment right to trial by jury, along with the due process right of access to the courts to seek legal redress, has served as the cornerstone of the civil justice system. Those rights provide Americans with the means for vindicating all others.

The companies responsible for mass torts present the justice system with severe challenges. ATLA has never blindly opposed class action settlements as an intelligent means of addressing those challenges, *provided* that the members of the class are afforded the opportunity to make a knowing and intelligent choice between the settlement offer and a tort remedy. In ATLA's view, the court of appeals in this case correctly held that a class action settlement that did not protect the rights of future victims of Agent Orange is subject to collateral attack by those victims seeking to exercise their constitutional right.

SUMMARY OF THE ARGUMENT

1. Petitioners mischaracterize this case as one of mere dissatisfaction with the outcome of a long-closed settlement by litigants seeking a "second bite at the apple" by way of collateral attack. The truth is that by the time the Vietnam veterans in this case showed any signs of cancer allegedly caused by Agent Orange, the apples had all been consumed and the tree chopped down and hauled away.

Respondents challenge the settlement as constitutionally infirm from the start. The presently

harmed named plaintiffs, with the active participation of the district court, bargained away not only their own rights to seek damages in a jury trial, but also the rights of unknown and unaware class members who would not manifest any symptom of disease until sometime in the future. As to the members of that "futures class," including Respondents, the right to trial by jury was not "preserved" as commanded by the Seventh Amendment. The historical background of that amendment demonstrates the importance of jury trial as a fundamental right. Its denial entitled Respondents to collaterally attack the prior settlement and pursue their legal remedies.

Petitioners also err in their contention that, if collateral attack is permitted, it must ignore the decisions of this Court, rendered after the class was certified and the settlement approved, regarding the due process requirement of adequacy of representation of absent class members. This Court has made clear that its decisions must be applied retrospectively to actions taken prior to the date of those decisions. In civil actions, this rule applies to collateral attacks as well as direct appellate review.

2. Judgments that are obtained in violation of due process are clearly subject to collateral attack. In the context of class actions, due process requires that absent members be given meaningful notice, that named representatives adequately represent the interests of absent members at all times, and, where claims are for money damages, that class members be afforded the opportunity to opt out of the class.

The class action proceedings in this case failed to satisfy any of the three essential due process requirements. More broadly, a class that is

structured to include the personal injury claims of a large number of unknown persons who may manifest injury sometime in the future, cannot satisfy the requirements of due process using the procedures adopted here.

The problems of giving notice to a class of unknown persons who are themselves unaware that they are "injured" are insurmountable. Class representatives and class counsel cannot represent both presently harmed claimants and future victims due to their inherently conflicting interests. Providing the opportunity to opt out is a meaningless gesture for a class member who may manifest some injury sometime in the future. Inherently, members of a futures class lack the crucial information that is essential to making a knowing and intelligent decision whether to opt out of the settlement.

3. Preserving the due process and Seventh Amendment rights of future injury victims need not destroy the usefulness of class actions in addressing the challenges of mass torts. Provision in the settlement for a delayed opt-out – by which a member of a futures class can choose between the settlement plan and a tort remedy – places future victims in greater parity with class members with present harms and ameliorates the conflicts of interest between the classes. Also referred to as a "back-end opt-out," this procedural device is feasible and has gained support among some courts and commentators. It should be employed in class action settlements such as this case to protect the due process rights of a class of unknown and unknowable future victims of mass torts.

ARGUMENT

I. THE SETTLEMENT OBTAINED IN VIOLATION OF THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF FUTURE VICTIMS OF AGENT ORANGE IS SUBJECT TO COLLATERAL ATTACK.

Daniel Stephenson and Joe Isaacson, while serving their country in Vietnam, were exposed to Agent Orange. In 1996, Isaacson was diagnosed with non-Hodgkin's lymphoma; Stephenson was diagnosed with multiple myeloma, a bone marrow cancer, in 1998. Both diseases are associated with exposure to Agent Orange.[2]

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[2] The district court's rulings were colored by the court's firm belief that the veterans' suits were "so weak as to be virtually baseless," Pet. at 3, based on extant studies that there was no evidence of "a causal connection between exposure to Agent Orange and the serious adverse health effects claimed by plaintiffs." *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1231 (E.D.N.Y. 1985). *See also, In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 782-83 (E.D.N.Y. 1984) (same).

That belief, given the long latency period of cancers and some other diseases, proved premature. The National Academy of Sciences, at the direction of Congress, undertook an ongoing study of the health effects in veterans who were exposed to Agent Orange. *See* Pub. L. No. 102-4 (1991). The peer-reviewed study concluded that there is positive evidence of causation of three types of cancer, including non-Hodgkin's lymphoma. There is also evidence of a limited association between Agent Orange and multiple myeloma. National Academy of Sciences, Institute of Medicine, "Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam (1994), excerpted in Joint Appendix at 319. Full text available online at http://books.nap.edu/books/0309048877/html/index.html, along with biennial update reports.

Most Americans in similar circumstances are entitled to seek legal redress in court and present their case before a jury to hold the manufacturers accountable. Those rights are guaranteed by the Constitution that soldiers fight to defend. Early in our nation's history, Chief Justice Marshall declared:

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

The district court in this case, however, delivered more tragic news to Stephenson and Isaacson. Their constitutional rights had been bargained away, years before either had any symptom of disease, in a private deal between lawyers representing victims of Agent Orange and the herbicide's manufacturers. With the district court's approval, they traded the constitutional rights not only of those suffering in 1984 from diseases allegedly linked to Agent Orange – who were given a choice to opt out – but also the rights of all veterans who would develop diseases in the future. In exchange, they received a settlement that the lower court characterized as "essentially a payment of nuisance value." *In re Agent Orange Product Liab. Litig.*, 818 F.2d 145, 151 (2nd Cir. 1987).

Because the settlement violated Respondents' fundamental constitutional rights, the court of appeals correctly permitted Stephenson and Isaacson to collaterally attack the judgment so they could

assert their constitutional rights to seek legal redress.

A. The Settlement Was Obtained In Violation of the Constitutional Right To Trial By Jury of Future Victims.

Petitioners mischaracterize Respondents' challenge to the Agent Orange settlement as simple disappointment that, "as matters turned out, they did not receive benefits from the settlement as great as those received by certain other class members." Pet at 2. Petitioners' primary argument is that "after-the-fact dissatisfaction with the outcome of litigation" cannot justify a collateral attack on the judgment, and that "parties do *not* get a second bite at the apple simply because they are unhappy about how the judgment played out over time." Pet. at 22.

Of course, when Stephenson and Isaacson were first diagnosed with cancer, the apples had all been eaten and the tree chopped down and hauled away.

Their challenge is that the settlement was constitutionally infirm from the start and "compromise[d] their Seventh Amendment rights without their consent." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). Petitioners rely on this Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) that a litigant may not seek a redetermination of the merits of a legal claim that has been decided by a court of competent jurisdiction. *See* Pet. at 20. However, the Court also made clear that courts "may not grant preclusive effect . . . to a constitutionally infirm judgment." 527 U.S. at 482.

The importance of trial by jury as a fundamental right must not be undervalued if it is to be "preserved," as commanded by the Founders. [3]

Sadly, Americans' right to trial by jury has suffered a "gradual process of judicial erosion." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 339 (1979) (Rehnquist, C.J., dissenting). At times the jury has even become the object of disparagement, perhaps because its history has become overlooked or unappreciated. *See* Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History,* 44 Hastings L.J. 579 (1993).

A war was fought, and soldiers' lives were lost, to win this right. The American colonists treasured the jury as essential to democratic self-government and a check against oppression. They admired the heroism of Edward Bushnell and the other jurors who refused to convict Quaker William Penn in 1670, though the jurors were harassed, fined, and jailed by the trial judge. *See* John Guinther, THE JURY IN AMERICA ch. 1 (1988).

They rejoiced when a jury in 1688 acquitted seven Anglican bishops of seditious libel for opposing James II. The case confirmed their view of the jury "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by*

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3 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend vii.

Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.*

They cheered the jury verdicts – including large punitive damage awards – in civil suits by John Wilkes and his printer against officials who conducted an illegal search in their effort to suppress Wilkes' criticism of the government. *Wilkes v. Wood,* Lofft 1, 98 Eng. Rep. 489 (K.B. 1763), and *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P. 1763). Wilkes' case was "a matter of keen interest in the American colonies." Landsman, *supra*, at 591, and "was probably the most famous case in late eighteenth century America, period." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 772 (1994).

Among grievances the colonists lodged against King George III in the Declaration of Independence was: "For depriving us in many cases, of the benefits of Trial by Jury."

When the Constitutional Convention finished its work without an express guarantee of the right to trial by jury in civil cases, the omission very nearly doomed ratification of the entire constitution. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295-98 (1966). Charles W. Wolfram, *The Constitutional History of the Seventh Amendment,* 57 Minn. L. Rev. 639, 672 n.89 (1973). Ultimately, as Justice Story recounts, the Federalists' agreement to adopt a Bill of Rights that included a guarantee of jury trials in civil cases, won support for the new constitution. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830).

Mindful of this history, this Court has repeatedly emphasized:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). This Court "has carefully preserved the right to trial by jury where legal rights are at stake." *Terry, supra*, at 565.

The rights of Stephenson and Isaacson, who had no meaningful opportunity to opt out of the settlement nor to exercise a knowing and intelligent waiver, were not "preserved."

Petitioners respond that without the authority to bind all class members, defendants will not enter into such global settlements, depriving the public of the efficiencies of such arrangements. Pet. at 38-40.

Administrative efficiency, though laudable, does not trump the Seventh Amendment. The Court emphasized this point in holding that Congress may not transfer legal claims from Article III courts to non-jury bankruptcy tribunals:

> It may be that providing jury trials in some fraudulent conveyance actions . . . would impede the swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations. But 'these considerations are insufficient to overcome the clear command of the Seventh Amendment.'

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 63 (1989), quoting *Curtis v. Loether*, 415 U.S. 189, 198 (1974).

As then-Justice Rehnquist once observed:

> [N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . .
>
> [T]he civil jury was surely a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the right secured by the Amendment.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 346 (1979) (Rehnquist, C.J., dissenting).

B. The Principles Set Forth By This Court In *Amchem* and *Ortiz* are applicable to this Settlement

Anticipating that this Court may uphold the court of appeals in allowing collateral attack on the settlement, Petitioners present a second question. In determining whether the settlement meets the due process requirement of adequacy of representation under *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), Petitioners contend the court may not apply the principles enunciated by this Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Pet. at 46-50. Rather, Petitioners argue the Court must

limit itself to case law existing at the time of class certification and settlement in 1983-84. Pet. at 46.[4]

This Court has clearly mandated:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. *Virginia Dep't of Transp.*, 509 U.S. 86, 97 (1993).

Petitioners place great emphasis on the Court's qualification "*still open on direct review.*" Pet. at 24 n.5. The Court explained, however, that this proviso was animated by "our view of retroactivity in the criminal context." 509 U.S. at 97. The Court referred to Justice Souter's plurality opinion in *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 541 (1991), stating that, although "new rules must apply retroactively to all criminal cases pending on direct review, we have since concluded that new rules will not relate back to convictions challenged on habeas corpus." *Id.* at 540. That distinction, Justice Souter stated, does not apply "in the civil arena." *Id.* Consistent with that view, the Court in *Harper* held, without qualification, "we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases." 509 U.S. at 97. For that reason, Petitioners' heavy reliance on habeas corpus decisions, *see* Pet. at 48 & 49. n.13, is inapposite.

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4 Presumably, Petitioners also reject the application of this Court's 1985 decision in *Shutts*.

Petitioners' reliance on this Court's sensible rule that "once suit is barred by res judicata . . . a new rule cannot reopen the door already closed." Pet. at 24 n.5, quoting *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.), is similarly misplaced. Where a party is not barred by *res judicata* by virtue of the due process clause and may therefore collaterally attack a prior judgment, that attack is governed by the current decisions of this Court.

It is difficult to discern any principled basis for rejecting this rule in this instance. Petitioners certainly cannot claim to have relied on settled law permitting class litigants to extinguish the constitutional rights of unknown future victims.

The 1966 Advisory Committee expressed doubt that class actions were appropriate at all in mass accident cases. *See Ortiz*, 527 U.S. at n.20. As one scholar has pointed out, the Agent Orange settlement and the asbestos settlements involved in *Amchem* and *Ortiz* are the only global settlements of mass tort class actions involving large numbers of unknown future victims. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1451-52 (1995).

Nor can it be argued that this Court's holding – that the Rules Enabling Act precludes a court from applying Rule 23 in a manner that violates the jury rights of future victims – erected a new principle of law. The right to trial by jury, as described above, is deeply rooted in our historical tradition. Moreover, at the time this settlement was crafted, the Rules Enabling Act provided that the rules of civil procedure

> shall not abridge, enlarge or modify any substantive right *and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.*

28 U.S.C. § 2072 (1958 ed.) (emphasis added).[5]

The Due Process guarantee is flexible, but it does not "shift and spring" in and out of existence according to the settlement calendars of the district courts. *Cf. Harper, supra*, at 97.

II. A CLASS ACTION THAT PURPORTS TO INCLUDE THOSE WHO WILL SUFFER COMPENSABLE PERSONAL INJURY ONLY IN THE FUTURE IS STRUCTURALLY AND PROCEDURALLY INCAPABLE OF AFFORDING THOSE VICTIMS DUE PROCESS.

Despite their strenuous argument concerning the importance of res judicata and finality, Petitioners admit, as they must, that "[o]f course, any judgment may be attacked if enforcing it would violate due process." Pet. at 26. Petitioners further state that, looking at the procedures used, not the result obtained in an individual case, *id.* at 30-31, "this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent

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[5] The Rules Enabling Act was amended in 1988, and the specific reference to the jury right was omitted. The clause apparently was deemed superfluous; Congress could not and did not authorize rules of procedure that violate the Seventh Amendment. "[T]he Constitution needs no statute to remind us that neither a rule nor a statute can upset a constitutional requirement." David D. Siegel, Commentary on 1988 and 1990 Amendments, reprinted in 28 U.S.C.A. § 2072 (1991).

parties who are to be bound by [the judgment]." *Id.* at 26, quoting *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

This is exactly that case.

This Court set forth the minimum procedural due process requirements necessary if res judicata is to bind an absent class action plaintiff:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, . . . The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (citations omitted).

ATLA submits that the class action settlement in this case failed to satisfy any of these three procedural safeguards. Indeed, by certifying a class that purports to adjudicate the personal injury claims of a large number of unknown persons who may develop some disease at some time in the future,

the court made it structurally impossible for the procedures adopted to satisfy minimum due process requirements.

A. Meaningful Notice Cannot Be Provided To Unknown Future Personal Injury Victims.

In ordinary litigation, failure to provide notice and an opportunity to be heard renders a judgment vulnerable to collateral attack. *See, e.g., Griffin v. Griffin*, 327 U.S. 220, 228 (1946) ("Because of the [lack of notice], and to the extent that petitioner was thus deprived of an opportunity to raise defenses . . . there was a want of judicial due process, and hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of a judgment in personam against him."). The Court's *Shutts* opinion, quoted above, makes clear that the same rule applies in class actions. *See e.g., Richards v. Jefferson County*, 517 U.S. 793, 798 (1996), in which a unanimous Court held that it violated due process to bind plaintiffs by a prior judgment of which they had inadequate notice. Justice Stevens wrote, "We have long held, however, that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" *Id.* at 797. *See generally,* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation,* 75 Tex. L. Rev. 571 (1997).

The inherent difficulties of conveying meaningful notice to large numbers of unknown, exposure-only class members are immediately apparent. There is no reliable assurance that notices and media announcements actually reach a substantial portion of the class. Even more problematic is the fact that, by definition, the

members of the class have no symptoms of disease. Many are likely to disregard notices they assume are inapplicable to them.

Finally, as a means of apprising such healthy class members of their opportunity to be heard and participate in the proceedings, notice at this time is a meaningless gesture. Basic information that is crucial and typically available at the time a plaintiff's cause of action accrues – the nature and seriousness of the disease, the medical and other costs it will entail, its impact on plaintiff's life and livelihood – is lacking.

The lower court in the *Amchem* settlement litigation found that these obstacles to providing adequate notice to future victims were "insurmountable." *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 633 (1996). *Accord,* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction,* 80 Cornell L. Rev. 811, 828 (1995). Although this Court was not required to rule on that issue definitively, Justice Ginsberg, for the Court, recognized "the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Amchem,* 521 U.S. at 628.

ATLA submits that notice to such a class is an empty exercise. This Court has warned, "when notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

B. Named Representatives Cannot Provide Adequate Representation of Future Personal Injury Victims.

Petitioners concede that it "is, to be sure, a fundamental tenet of due process that a party may not be bound by a judgment in a representative suit if he or she was not 'adequately represented' in the proceedings leading to that judgment." Pet at 26. This Court has consistently so held. See, e.g., *Richards* v. *Jefferson County*, 517 U.S. 793, 794 (1996); *Shutts*, 472 U.S. at 812; *Hansberry*, 311 U.S. at 41-42.

As this Court made clear in both *Amchem* and *Ortiz*, a class that includes both presently injured plaintiffs and those who will manifest harm only in the future is riven by inherently conflicting interests. Those conflicts make it impossible for the named representatives and counsel for the entire class to provide adequate representation to the members of the futures class. *Amchem*, 521 U.S. at 625-28; *Ortiz*, 527 U.S. at 853.

This conflict is starkly exemplified in this case. The district court initially ruled that representation was adequate, and the court of appeals affirmed based almost entirely on "the centrality of the military contractor defense," which applied to all class members equally, in the class trial, following which individual issues, such as damages, "were to be left to individual trials." *In Re Agent Orange Product Liab. Litig.*, 818 F.2d 145, 150 & 164-65 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

When Petitioners agreed to a settlement, offering a fund of $180 million to be distributed among the class, the sole basis for that finding of adequate representation vanished. The district court itself indicated that its distribution plan involved a zero sum game in which funds allocated to future

claimants necessarily diminished funds available to those presently injured. Pet. at 9. The court's distribution plan provided that those manifesting injury after Dec. 31, 1994 would receive nothing, expressly to provide greater compensation "to acutely ill veterans who were most in need of assistance." Pet. at 10. The court was aware that at least some members of the class would be denied compensation, though the court was hopeful that "almost all valid claims will be revealed before that time." *Ryan v. Dow Chemical Co.*, 781 F. Supp. 902, 919 (E.D.N.Y. 1991). All the named class representatives were presently injured claimants. Pet. at 9. Quite obviously, there was not adequate representation – more precisely, there was no representation – of the interests of later-injured class members like Stephenson and Isaacson. The named representatives did not adequately represent the absent class members *"at all times."* *Hansberry v. Lee,* 311 U.S. at 43; *Shutts,* 472 U.S. at 812. (emphasis added).

Petitioners' response is two-fold. First, they assert that Stephenson and Isaacson were required to raise any objection to representation at the proceeding itself or on direct appeal. Having made an actual determination that representation was adequate, that determination precludes any attack in another court. Pet at 26 & 32.

Petitioners ignore the well-settled rule, as stated by Justice Rehnquist for the Court in *Shutts,* that "a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment." 472 U.S. at 895. This rule is equally well-established in the context of class actions.

> Where a person is not a party to a class action, the judgment therein has conclusive effect against him only if his interests were adequately represented. . . . [A] person as to whom a class action is ineffective *is not required to seek relief during the continuance of the action.*

Restatement of Judgments § 116 comment b, at 563-64 (1942) (emphasis added).

In the absence of minimum contacts with the forum, a court cannot constitutionally compel an absent class member to appear and raise objections to the adequacy of representation. Nor does Rule 23 compel him to do so. Indeed, "an absent class-action plaintiff is not required to do anything." *Shutts*, 472 U.S. at 510. See generally, Patrick Woolley, *The Availability Of Collateral Attack For Inadequate Representation In Class Suits*, 79 Tex. L. Rev. 383 (2000).

The Advisory Committee's Note accompanying the 1966 amendment to Rule 23 confirms that

> [The Rule] does not disturb the recognized principle that the court conducting the [class] action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action.

Petitioners' second argument is that for the district court to have created subclasses and designated representatives of future victims would have added little to their protection, because all parties shared the same "veil of ignorance" as to who would develop what disease in the future. Pet. at 23. In this, Petitioners may be correct. If so, however, they make it all the clearer that the structure of the class in this case made impossible for the procedures

adopted to afford minimal due process protection to the class of future victims.

C. Future Personal Injury Victims Cannot Be Provided With A Meaningful Opportunity At Settlement To Opt Out.

The third essential requirement of due process is satisfied by "affording absent class members, whose claims for money damages would be entitled to a jury trial an opportunity to remove himself from the class." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 (1985). *Cf. Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dism. as improvidently granted*, 511 U.S. 117 (1994)(where Brown had no opportunity to opt out of class action, "there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*.").

The right to opt-out of the class action serves both the command of the Seventh Amendment and "our 'deep- rooted historic tradition that everyone should have his own day in court,'" *Ortiz*, 527 U.S. at 846, quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

Tort victims in particular have a "vital interest" in having some measure of control over litigation that may affect their lives. *Yandle v. PPG Indus. Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974); *Causey v. Pan Am World Airways, Inc.*, 66 F.R.D. 392, 299 (E.D. Va. 1975); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76, 79 (E.D. Pa. 1970); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev 193, 286-87 (1992). *See also* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 74 ("the right to control personally the suit whereby

a badly injured person seeks redress from the alleged tortfeasor has long been valued both here and in England.").

Indeed, the district court in this case found in the course of listening to veterans and their families during the fairness hearings that, "[m]any veterans who opposed the settlement did so because they wanted their 'day in court.'" *In re Agent Orange Product Liab. Litig,* 597 F. Supp. 740, 770 (E.D.N.Y. 1984).

Yet, if the court of appeals decision is reversed, veterans like Stephenson and Isaacson who develop disease after the prescribed opt-out period will find their causes of action have been "kidnapped," and they have been "deprived of any freedom of action by being drawn involuntarily into collective litigation." Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 821 (1995).

The very structure of a class action that purports to include unknown future victims makes it impossible for the opt-out procedure to protect due process. In Professor Coffee's view, "a future claims class action trivializes the right to opt out." John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343, 1446 (1995).

The obstacles to notifying and informing future victims of their opt-out rights are, as described earlier, insurmountable. *See* Part II., A, above.

More importantly, one who has not manifested any present injury, even if notified, lacks the basic

information needed to make an intelligent decision whether to remain in the class or to pursue a tort action that has not, and might not accrue. *See* Brian Wolfman and Alan B. Morrison, *Representing The Unrepresented In Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 451-55 (1996). Earlier in this litigation, the appellate court candidly stated that providing an opt-out right to a person "unaware of an injury would probably do no good." *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993), cert. denied, 510 U.S. 1140 (1994).

A leading scholar in the field of class actions pointedly agrees:

> For class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right within a court-designated period of time . . . is of no beneficial use.

1 Herbert B. Newberg, CLASS ACTIONS § 1.23 at 1-55 (1992).

This situation is little more than a new variation on an old injustice: rigid statutes of limitations or statutes of "repose" under which a person's cause of action in tort can become time-barred even before any harm occurred or became manifest. The harsh rule was famously lampooned by Judge Frank in *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) ("Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted . . ."). Nearly every jurisdiction has rejected this harsh result in favor of a "discovery rule," under which the limitations period does not begin to run until the person knows or should have

known of his or her injury. *See, e.g., Urie v. Thompson,* 337 U.S. 163 (1949). Nor is it fair, ATLA submits, to strip victims of cancer or other long-latency diseases of the right to legal redress and a jury trial for failing to opt out of a class action long before they could have known of their injury.

* * *

In sum, a class action that purports to extinguish the jury rights of unknown class members who will manifest injury in the future cannot provide those class members with the essential procedural guarantees of due process. They cannot be bound by the judgment and the court of appeals correctly held that they may vindicate their rights by collateral attack.

III. CLASS ACTION SETTLEMENTS THAT INCLUDE FUTURE PERSONAL INJURY CLAIMANTS CAN PROTECT DUE PROCESS RIGHTS BY PROVIDING A DELAYED OPT-OUT.

Petitioners expend a great deal of energy and ink warning that affirmance of the court of appeals decision will rob the civil justice system and the public of the benefits of global settlements of mass tort litigation. See, e.g., Pet. at 39-40.

As noted earlier, class actions involving large numbers of exposure-only class members who may develop disease in the future have been rare. Nor may courts exceed their authority under the Rules Enabling Act and violate the constitutional rights of absent class members in pursuit of administrative convenience and efficiency.

Most importantly, however, protecting the constitutional rights of future injury victims need not lead to a "class action mechanism sapped of much of its utility" Pet. at 18. The previous analogy to the discovery rule suggests that class action settlements such as this one can be made consistent with due process and the Seventh Amendment.

ATLA suggests that class actions involving exposure-only class members can safeguard the due process rights of those class members by providing a delayed opt-out as part of the settlement plan. In its simplest form, the opt-out provision is triggered when a member of the futures class develops a disease or harm covered by the settlement plan. At that point, his or her cause of action accrues and the statute of limitations begins to run. Within that period, the plaintiff is offered a choice: accept the compensation offered by the settlement plan or pursue a legal remedy in court.

Such a procedural device, often referred to as a back-end opt-out, minimizes the adverse effects of the time factor. It places those who manifest harms years after approval of the settlement in close parity with those who were members of the presently injured class. It also serves as a check against the inherent "tug" in favor of the presently injured at the expense of futures. *Amchem* at 521 U.S. at 626. A settling defendant desirous of avoiding a stream of post-settlement lawsuits has an interest in assuring that the settlement provisions are sufficiently generous to future victims that they, like the presently injured, will waive their tort remedy in favor of participating in the settlement.

These advantages have persuaded a number of commentators to recommend the use of a delayed

opt-out as a means of preserving the rights of future claimants. *See* Brian Wolfman and Alan B. Morrison, *Representing The Unrepresented In Class Actions Seeking Monetary Relief,* 71 N.Y.U. L. Rev. 439, 478 (1996); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343, 1448-52 (1995); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 964-68 (1995). Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions,"* 80 Cornell L. Rev. 811, 836 (1995).

Use of such a procedural device to protect the due process rights of a futures class is not simply feasible; it has been put to use. In *Bowling v. Pfizer, Inc.,* 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dism.* 995 F.2d 1066 (6th Cir. 1993), a class action by patients who received defective artificial heart valves, the settlement agreement expressly provides that class members whose heart valves fracture in the future may opt to reject guaranteed compensation and sue for damages at that time. *Id.* at 150. A class action settlement on behalf of women injured by the Dalkon Shield contraceptive device also included a back-end opt-out. *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 745 (4th Cir.), cert. denied, 493 U.S. 959 (1989). A back-end opt-out was similarly provided in the settlement agreement resolving claims by users of the prescription drug combination known as "fen-phen." *In re Diet Drugs Products Liab. Litig.*, 2000 WL 1222042 (E.D.Pa. 2000), at *21.

The settlement at issue in *Ortiz* purported to include such an opt-out. However, the option was so qualified and restricted that it offered no true recourse to the tort system. 527 U.S. at 847 & n.23.

This Court suggests, however, that an unrestricted delayed opt-out would provide sufficient due process protections for "the legal rights of absent class members . . . who by definition may be unidentifiable when the class is certified." *Id.*

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

DOW CHEMICAL COMPANY, ET AL.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE STATE OF LOUISIANA JOINED AT THE CERT. STAGE: ARKANSAS, MARYLAND, MINNESOTA, MISSOURI, AND MONTANA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*

This brief *amici curiae* is submitted by six States. Our purpose is to highlight for this Court the enormous importance to our federalist system of permitting collateral review of adequacy of representation determinations made in multistate class actions. *Amici* believe that the position urged by Petitioners here – that defendants' interest in finality outweighs absentees' interest in adequate representation – fundamentally misconstrues due process and vitiates the only device through which *amici* can shield their citizens from class action abuses in distant forums. According to Petitioners, a court assessing the *res judicata* effect of a class judgment must unquestioningly accept the conclusion of the original certifying court that the entire class received adequate representation, even if a more dispassionate or more careful review reveals that the certifying court was wrong. In other words, Petitioners contend that class members should be bound to a class judgment even under circumstances where they may clearly have not received due process. This position flatly contradicts this Court's consistent jurisprudence in the areas of *res judicata*, full faith and credit, personal jurisdiction, and due process.

In recent years, *amici*'s citizens have increasingly been deprived of their rights to pursue redress in their own states' courts as a result of their inclusion as absent members of sweeping nationwide and multistate class action settlements. While in many instances absentees have received adequate representation, unfortunately, abuses have frequently also been documented. The very structure of class actions as mass settlement vehicles can create incentives to give short shrift to the interests of absentees. These incentives and the potential for abuse

are greatly magnified in the context of cases, such as this one, where the class action purports to resolve claims for "future" injury.

Collateral review of adequacy of representation provides the only available tool for *amici* to ensure that their citizens will not be deprived of due process by a foreign court adjudicating their rights *in absentia*. *Amici* submit this brief in defense of their interest in retaining this tool for protecting the constitutionally-protected rights of their citizens.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of whether the due process clause ***accords a right of collateral review of adequacy of representation for absentee class members in response to a motion for dismissal of their claims on the basis of res judicata***. Whether relying upon settled principles of *res judicata*, the advisory committee's comments to Federal Rule 23 supporting such a review, or even the due process balancing test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), advocated by Petitioners, this Court should answer that question with a resounding affirmative. The threat that absent class members will be erroneously deprived of their rights always looms large in the class context, and that risk overwhelms any countervailing interest in finality. This balance is overwhelmingly skewed in favor of permitting

[1] *Amici* note that this brief was prepared with the assistance of Steve Baughman Jensen, an attorney in Dallas, Texas.

collateral review in cases, such as this one, where parties invoke a class judgment that purported to resolve then-unaccrued "future" claims.

The Agent Orange class action was settled in 1984 and purported to resolve all Agent Orange-related claims of Vietnam veterans, including those who might suffer injury in the future. At the time of the settlement, neither Daniel Stephenson nor Joe Isaacson, the Respondents, were eligible to receive any compensation from that settlement, as neither manifested any injury at the time. After all settlement funds were disbursed, in the late 1990's Respondents were diagnosed with rare cancers which have been associated with Agent Orange exposure by the National Academy of Sciences. JA 319-325. Upon learning of their cancers, Respondents sued Petitioners in separate actions that were later consolidated. Petitioners successfully moved to dismiss their claims on the ground that they were precluded by the 1984 class action judgment, even though neither Respondent was eligible at any time for compensation from that settlement. The Court of Appeals for the Second Circuit unanimously reversed, holding that due process had been violated, as neither Respondent had received adequate representation in the class action proceedings, while also indicating that they likely had not received adequate notice and a meaningful opportunity to opt out. The Second Circuit ruled that the class judgment was therefore not entitled to preclusive effect on Respondents' claims. Petitioners now assert that the Second Circuit should be reversed even if Respondents' due process rights have been violated, on the basis that no challenge to a finding of adequate representation made by a certifying court should ever be permitted in any other court, regardless of its merit.

Amici disagree with Petitioners contention that would remove any right of review by courts other than the certifying court, and, instead, believe that this Court should affirm the longstanding right of courts to conduct such a collateral review of whether due process has been denied to absent class plaintiffs. This Court has consistently held that judgments will only be entitled to preclusive effect when the court entering those judgments both had proper jurisdiction and provided full due process protection to the litigants. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 (1982).

Adequate representation must have been afforded to absentees before a court may extend full faith and credit to a class judgment. Although federal Rule 23 and its state counterparts require that courts find that a putative class has been adequately represented as a prerequisite to certification, the risk is unacceptably high that such an initial finding of adequate representation may be wrong. In the class context, courts have a powerful incentive to conflate the issues of adequacy with the overall perceived fairness of any settlement. By the time of settlement, class counsel and the defendant often become aligned in their desire for court approval, and no structure exists to ensure full-blown adversarial presentation of the issue of adequacy. Recent trends demonstrate that certain courts are disturbingly likely to approve *any* proposed class action settlement. Often, such settlements have nationwide or multistate scope, so that many absent class members lack contacts with the forum and can neither afford to hire separate counsel nor travel to present their own objections. This is particularly true of "futures," who may not

have sufficient present damages to justify such expense. It is these citizens of *amici* who deserve the protection that is afforded by the ability to conduct a collateral attack in their own state's forum.

Indeed, the already unacceptable risk that a certifying court will make an erroneous finding of adequacy is magnified considerably in the future claimant context. When class actions purport to resolve claims that do not yet exist at the time of the settlement's approval, any initial adequacy review necessarily requires prediction of unknown events that creates an inherently alarming risk that many class members will unfairly be deprived of their as yet unaccrued rights. The facts of Respondents' cases illustrate this dramatically. How could Messrs. Isaacson and Stephenson have been adequately represented in a class action that extinguished their causes of action before they ever arose and without any compensation? They have not received the adequate representation guaranteed them by the Due Process Clause, and this Court should not permit Petitioners' illegitimate interests in premature finality to outweigh Respondents' right to a day in court.

ARGUMENT

I. Class Action Abuse Poses a Significant Threat to the Rights of *Amici*'s Citizens.

Amici urge this Court to recognize the reality that class litigation has at times resulted in serious abuses of class members' rights. Petitioners seek to blind the Court to that reality by pointing instead to the legal requirements for class certification. In theory, and when properly administered, those requirements should result in class

members receiving due process. However, the ongoing historical record demonstrates that class certification requirements alone have sometimes proven insufficient to protect absent class members, who, by the very nature of the class procedure, are highly vulnerable to exploitation.

Class action abuses in recent years have generated a frenzy of media attention, academic scholarship, and both legislative and judicial proposals for reform. *Amici* take no position here with respect to any proposed reform but merely ask this Court to recognize the critical need to maintain the check on abuse afforded by the availability of collateral review of adequacy of representation.

Class action abuse may take a number of forms, but the most notable are inadequate settlements and sweeping class definitions that encompass absent members from many states, without regard to differences in state law. The two abuses can go hand-in-hand. Individual class members with stronger legal claims almost invariably are treated inequitably in overbroad classes. And, because of the difficulty in analyzing several sets of competing state laws, courts certifying multistate class actions often gloss over state law differences in order to approve a settlement. As former U.S. Solicitor General Walter E. Dellinger III testified to Congress: "Many state courts faced with interstate class actions, however, have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, which results essentially in a breach of federalism principles."

The academic literature is flush with critiques of judicial scrutiny of adequacy and fairness in the class context. As Professor Wooley states, ***"The literature indicates that courts all too often have had little***

ability or incentive to insure that absent class members are treated fairly." Wooley, 79 TEX. L.R. at 412 (citing six law review articles in support). Professor Klement has elaborated on the inadequacy of courts as monitors of class action abuse:

> ***Constrained by the institutional requirements of neutrality and passivity set by the adversary system on the one hand, and lacking sufficient adversity between the defendant and the class attorney whenever attorney fees and proposed settlements are concerned on the other, courts have been left, by and large, uninformed about the parameters necessary to effectively regulate class attorneys. Taking into account their constrained resources and overburdened dockets, it is not surprising that courts have failed to adequately monitor class actions.***

Klement, *supra*, 21 REV. LITIG. at 45.

Indeed, in reviewing class settlements, Courts are often presented with the sweetheart's dance between the united settlement proponents of class counsel and defendant, *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (noting that settlement proponents **"may *even put one over on the court, in a staged performance*"**). While Plaintiff's counsel has the incentive of an immediate payday, class action Defendants have an incentive to embrace such settlements as a means to limit their liability.[2]

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[2] Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, Wall St. J., July 18, 1996 at A1

(Continued on following page)

Both courts and academic scholars have sounded the alarm with respect to these problems.[3] Indeed, class action abuse has become sufficiently recognized that certain mainstream media have heralded the issue, including the fact that judicial review has proven inadequate to stem the tide.[4]

Amici have summarized the problem of class abuse for a very significant reason: to remind the Court that *direct*

(noting an emerging trend for corporate defendants to embrace the class action settlement as a means to limit its liability). Additionally, in certain cases potential objectors have been bought out in order to avoid an objection or an appeal.

[3] *See, e.g., Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring) (***"Plaintiffs' attorneys are increasingly filing nationwide class actions in various state courts. . . . [M]ost of these cases in actuality will be disposed of through "coupon" or "paper" settlements."***); Susan P. Koniak and George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056 (1996) ("We agree with those who argue that lawyer abuse in class actions is rampant and that the current system, far from keeping this abuse in check, is set up to shield lawyers from the consequences of their misdeeds."); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 43-44 (2002); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L.R. 1343, 1348 (1995) ("If not actually collusive, non-adversarial settlements have all too frequently advanced only the interests of plaintiffs' attorneys, not those of the class members").

[4] *See, e.g.*, Pamela Sherrid, *Class Action Crumbs*, U.S. News & World Rep., Mar. 25, 2002, at 24 ("this tale illustrates the failings of the nation's legal system in protecting the interests of society's most vulnerable: the little guy"); Joe Stephens, *Coupons Create Cash for Lawyers; Class Action "Paper" Settlements Mean Little to Individual Plaintiffs*, Wash. Post, Nov. 14, 1999, at A1 (noting many examples of court approval of settlements that provided only coupon relief to class members); Barry Meier, *Plaintiffs in Business Cases Challenge Group Justice*, N.Y. Times, Feb. 18, 1997 (discussing class action in which one class member paid $91 in legal fees for a recovery of $2).

review of adequacy of representation, as required by Federal Rule 23 and its state counterparts, has all too often failed to ensure that absent class members receive due process. In light of these failures and the need to preserve a mechanism by which *amici*'s citizenry will not be unfairly bound by such settlements, *amici* now turn to the legal reasons why this Court must preserve the right of courts to review a rendering court's assessment of adequacy of representation.

II. Due Process Guarantees the Right of Collateral Review of Adequacy of Representation.

The right of collateral review of adequate representation is essential to due process, and has historically been considered a central aspect of the class action procedure. ***See 18 Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 4455, at 452 (Supp. 2000) ("It has long been the general understanding . . . that only adequate representation can justify preclusion against nonparticipating class members."); MOORE'S FEDERAL PRACTICE § 130.07[3] (3d ed. 1997) ("If the class did not receive adequate representation in the court rendering the class action judgment, that issue may be raised on collateral attack."); Advisory Committee Notes to Federal Rule 23 (1966)*** ("subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action.") ***As discussed below, this general view emerged both because of this Court's black-letter pronouncements regarding the constitutional requirements for giving preclusive effect to judgments, and because the conduct of a due process***

balancing inquiry significantly weighs toward the availability of collateral review.

A. Established principles of *res judicata* and full faith and credit permit collateral review of adequacy of representation.

In the context of applying the doctrines of full faith and credit and *res judicata*, this Court has consistently held that judgments will only be entitled to preclusive effect when the court entering those judgments both had proper jurisdiction and provided full due process to the litigants. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (judgment entered by court lacking personal jurisdiction is void); *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 (1982) ("If [the rendering] court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given"); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982) (noting that the rendering court must have provided procedural due process in order for judgment to have preclusive effect).

Petitioners respond to this due process requirement by pointing both to the certifying court's initial determination that the entire class was adequately represented, and to Respondents' (alleged) opportunity to object to adequate representation at the time of that initial review.[5] But this

[5] *Amici* observe here that the notice provided to Messrs. Stephenson and Isaacson in the Agent Orange class proceedings fell well short of due process requirements, as the class was expanded after the close of the opt out period from those who were "injured" by exposure to Agent Orange to those, like Respondents, who "had not yet manifested

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response is unavailing, given that absentees collaterally challenging adequacy have neither presented specific objections at the time of class certification, nor were they legally required to do so.

In *Martin v. Wilks*, 490 U.S. 755 (1989), this Court reaffirmed that even individuals who have received notice and a fair opportunity to be heard may collaterally attack adequacy if they were not *required* to appear and lodge their objections in the original proceeding. In *Martin*, a group of white firefighters filed a reverse discrimination lawsuit premised on the alleged illegality of hiring quotas that were implemented under a consent decree in an earlier case. Although the white firefighters were not named parties in the first case, they had received notice of the proceeding and had an opportunity to intervene to contest the consent decrees. 490 U.S. at 759-60. The trial court dismissed the claims as "impermissible collateral attacks" on the consent decree, and the Eleventh Circuit reversed. *Id.* at 760-61. This Court affirmed the Eleventh Circuit, holding that, because the white firefighters were not legally required to intervene to contest the original consent decree, they must be permitted an opportunity to raise a collateral challenge to the effect of that decree. ***"Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to***

injury." Thus, at the time of the original certification decision, no notice had been sent that indicated that people, such as Respondents, were included within the proposed class. Obviously, Respondents could not have objected to adequacy at the time of certification without having received constitutionally-adequate notice.

the jurisdiction of the court and bound by a judgment or decree." 490 U.S. at 765.

The holding in *Martin v. Wilks* is consistent with this Court's long-standing personal jurisdiction jurisprudence, which permits defendant to attack default judgments collaterally on the basis that the rendering court lacked jurisdiction over them, even when those defendants received actual notice of the original suit but failed to appear. *See Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931); Charles A. Wright & Arthur Miller, 18A FEDERAL PRACTICE & PROCEDURE § 4430 at *47222 (2002) ("The Baldwin opinion repeated the persisting rule that a defendant who makes no appearance whatever remains free to challenge a default judgment for want of personal jurisdiction").

Just as individuals are not required to intervene in actions affecting their rights, even when they have notice and an opportunity to do so, absent class members are not required by Rule 23 to present their objections to adequate representation before the certifying court. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) ***("an absent class action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection").***[6] Because

[6] The *amicus* Products Liability Advisory Council ("PLAC") argues that this language from the *Shutts* opinion cannot mean what it says. *See* PLAC Br. at 13. Apart from the fact that the language leads to a result PLAC does not support, PLAC's brief offers no explanation as to why the Court in *Shutts* did not mean that absent class members have no obligation to appear at the class certification hearing.

absent class members are not required to assert their objections to adequacy of representation before the original certifying court, they *must* constitutionally be entitled to do so in the context of an individual lawsuit in which the defendant raises a *res judicata* defense. *See* Patrick Wooley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L.R. 383, 403 (2000) [hereinafter "Wooley"] ("*Martin* and Rule 23 together make clear that under federal law class members cannot forfeit their rights to adequate representation by failing to object to inadequate representation in the class proceedings themselves").

Petitioners will likely attempt to distinguish *Martin* and cases involving default judgments on the basis that, under Rule 23, courts have an obligation to assure that absent class members have received adequate representation. *See* Pet. Br. at 27 (maintaining that adequacy is assured by the certifying court's Rule 23(a)(4) inquiry); *see also* PLAC Br. at 13 ("the absent class members are justified in relying on the certifying court, and the defendant opposing class certification, to protect their interests"). However, this assumes that the certification decision will always be correctly made and that absent class members can uniformly rely upon class representatives to evaluate their own adequacy when making their presentation to the court. As the next section will demonstrate, a certifying court's review of adequacy, in the absence of adversarial presentation by those affected, is insufficient to justify elimination of an absent class members' right to a day in court.

B. The protection afforded absent class members by continuing to afford the opportunity of collateral review of adequacy outweighs any contravening interest in eliminating such a review.

Contrary to Petitioners' contentions, when one balances the competing interests at stake with respect to permitting collateral review of adequacy, the balance strongly favors the availability of the procedure.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court established the basic test for determining how much process is due to protect a property interest. The Court must consider the nature and significance of the private interests at stake, the risk of error and the probable value of additional safeguards, and the competing interests of the public and other affected parties. 424 U.S. at 334; *Connecticut v. Doehr*, 501 U.S. 1, 10-11 (1991). Below, *amici* explore each of these factors in the context of collateral review of adequacy of representation if applied to absentees in representative litigation.

1. The interests at stake are significant. Petitioners acknowledge, as they must, that "Respondents' interest in adequate class representation . . . is important." Pet. Br. at 34. However, unwilling to grant that any part of a balancing test favors Respondents, Petitioners then go on to conflate the magnitude of the interests at stake with the risk of erroneous deprivation of that interest. *See* Pet. Br. at 34-35 (arguing that Respondents' interests were adequately protected by the certifying court's conclusion regarding the fairness of the settlement, its review of adequacy, and Rule 23's provision of the right to opt out). This will not wash.

Messrs. Stephenson and Isaacson both allege that they developed rare, life-threatening cancers as a result of Petitioners' wrongful conduct. Obviously, the nature of these plaintiffs' property interests in their claims is highly significant, whatever the protections allegedly afforded to protect those interests. This Court should not permit Petitioners to underplay the magnitude of the private interest of adjudicating responsibility for life-threatening cancers by pointing to procedures that Petitioners claim were in place for class representatives to present those interests. In any event, as described below, the procedures that Petitioners ballyhoo are not in any way sufficient to tip the scales their way.

2. Collateral review of adequacy of representation substantially reduces an otherwise significant likelihood that absent class members will be erroneously deprived of their rights. The risk that absent class members will be erroneously deprived of their rights in a class proceeding is unacceptably high in the absence of a double-check on the certifying court's determination of adequacy and willingness to thoroughly monitor that adequacy throughout the course of the litigation.

As set forth in detail in Part I above, the ugly, documented facts demonstrate that existing class action practice is subject to considerable abuses that manage to survive judicial scrutiny under Rule 23 and its state law counterparts. With their repeated invocations of Rule 23's certification requirements as the be-all-and-end-all of due process, Petitioners pound their fists on reality in the hopes that it might break. As starkly illustrated by the specific facts in Messrs. Stephenson's and Isaacson's cases, an initial Rule 23 inquiry, even if conducted in utmost good faith by a court assessing certification, may be

insufficient to protect absentees' rights. This is especially so because the certifying court expressly considers adequacy only at the certification stage, and, in many instances, inadequacy in representation occurs much later. *See, e.g., Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973) ("A court must view the representative's conduct of the entire litigation with this [adequacy of representation] criterion as its guidepost.").

Contrary to Petitioners' position that "there is [no] reason to believe that allowing *re*litigation of the issue would add much value in protecting against error," Pet. Br. at 36, a court reviewing adequacy on a collateral basis has a significant institutional advantage over the original certifying court. First, a court conducting a collateral review has the benefit of knowing how subsequent events have impacted the class representation, consistent with *Shutts*' requirement that adequacy be provided *"at all times,"* 472 U.S. at 812 (emphasis added). Second, as Professor Wooley explains, relying on a judicial officer to assess the truth in the absence of adversarial presentation is altogether inconsistent with our Anglo-American tradition of due process:

> ***Reliance on the special role of the court for this purpose [of binding absentees] would be inconsistent with foundational norms of American jurisprudence. Put another way, the principle that issues in a case are best resolved by reliance on adversarial presentation to a judge – rather than reliance on investigation by the judge – is embedded in the American conception of due process.***

Wooley, 79 TEX. L.R. at 411.

Perhaps the most outrageous risk of erroneous deprivation in the class action context occurs when, as in this case, the original court purports to resolve the "future" claims of individuals. By definition, at the time of such certification a court cannot know most of the relevant facts that dictate whether a class settlement is fair and whether an absentee has received adequate representation if that absent class member's claim has not yet arisen. No one knows what factual and legal circumstances might exist at the time such a future claim eventually accrues. Thus, courts assessing adequacy and fairness in the context of settlements purporting to resolve future claims must, implicitly or explicitly, make predictions about an unknown future. They must estimate the rate of future incidence of injury among class members, the likely period of time that such injuries will continue to occur, and the future value of any claims once the class members become ill. The uncertainties inherent in such predictions render any assessment of adequacy at the time of certification incredibly suspect.

In this case, of course, at the time of certification Judge Weinstein had little evidence to support class members' claims that Agent Orange causes disease, and that absence of evidence strongly colored his views of adequacy of representation. Now, subsequent to the conclusions of the National Academy of Sciences, which has related Agent Orange to certain cancers, including those of Respondents, the scientific evidence in support of causation is much stronger. JA 319-325. Moreover, absent class members, including Stephenson and Isaacson themselves, continue to assert credible claims of Agent Orange-related injuries years after the class settlement funds have been exhausted. Thus, the Agent Orange settlement

provides a harsh example of the risk of erroneous deprivation coming to fruition.

3. The States' public interest in preserving their citizens' rights to bring claims when they accrue favors collateral review. *Virtually every state law provides that a claim for specific disease does not accrue until that disease becomes manifest. These laws delay consideration of future claims precisely because the uncertainties surrounding such claims make them impossible to adjudicate before their accrual. Only in a class (or bankruptcy) setting have there been attempts to abridge the state substantive right of individual litigants to have their injury claims adjudicated after they accrue. Allowing unripe claims to be released by representatives, and especially when those representatives are present claimants with different motivations to settle, enhances the need for protection of those rights. Only the continued availability of collateral review of due process for such absent class members, including a review of notice and adequacy of representation, in many instances will allow future claimants to be heard at all. Preservation of the right to have due process reviewed collaterally will protect amici*'s citizens from those who attempt to abuse the class action device by settling claims which our states have intentionally preserved for another day. This federalism interest, although ignored by Petitioners, is of great significance.

4. Any contravening interest in finality does not outweigh class members' rights to a day in court. This Court has never valued efficiency over justice, and it should not do so in this context. Class action practice has proceeded apace in a world where collateral attacks have traditionally been permitted, and this case provides no reason to believe that a reaffirmation of that

tradition by this Court will upset that ongoing practice. Whether collateral challenges are brought by a few class members, or by a few thousand, the administrative burdens on the courts and altered expectations of defendants are a small price to pay to ensure that litigants are not stripped of their rights without representation.

CONCLUSION

For all the foregoing reasons, *amici* respectfully pray this Court affirm the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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SUPREME COURT U.S.
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No. 02-271

IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN LEGION, VETERANS OF FOREIGN WARS OF THE UNITED STATES, DISABLED AMERICAN VETERANS, VIETNAM VETERANS OF AMERICA, CATHOLIC WAR VETERANS, USA, INC., MILITARY ORDER OF THE PURPLE HEART, AMERICAN EX-PRISONERS OF WAR, BLINDED VETERANS ASSOCIATION, PARALYZED VETERANS OF AMERICA, ITALIAN AMERICAN WAR VETERANS OF THE U.S.A., AMERICAN WAR MOTHERS, LEGION OF VALOR OF THE UNITED STATES OF AMERICA, INC., THE MILITARY OFFICERS ASSOCIATION OF AMERICA, FLEET RESERVE ASSOCIATION, NON COMMISSIONED OFFICERS ASSOCIATION, ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE UNITED STATES, THE VETERANS OF THE VIETNAM WAR, INC., MILITARY CHAPLAINS ASSOCIATION, NATIONAL ASSOCIATION OF MILITARY WIDOWS, NEW JERSEY AGENT ORANGE COMMISSION, OKLAHOMA AGENT ORANGE FOUNDATION, AND AGENT ORANGE VICTIMS AND WIDOWS SUPPORT NETWORK IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici are 22 military and veterans service organizations, collectively representing more than 7,000,000 members.[1] Twelve *Amici* have been chartered by Congress to represent the interests of veterans of the Armed Forces and their families. In the context of this representation, *Amici* join together in solidarity to urge this Court to affirm the Second Circuit and allow Vietnam War veterans who are suffering from fatal diseases caused by their wartime service for this country which were not diagnosed until after 1994, and all Agent Orange settlement funds were gone, to have their day in court.

This unique coalition was inspired by the unstinting leadership of Admiral Elmo R. Zumwalt, Jr. (USN Ret.), who served as Special Assistant to the Secretary of Veteran Affairs and as Chief of Naval Operations during the Vietnam War. In his role as chairman of the Agent Orange Coordinating Council, Admiral Zumwalt provided a forum for many veterans service organizations to coordinate their interests in representing Vietnam veterans affected by Agent Orange.

Amici include the following chartered veterans service organizations: 1) ***The American Legion***, 36 U.S.C. § 41, *et seq.*, with 3.01 million members; 2) the ***Veterans of Foreign Wars of the United States***, § 111, *et seq.*, with 1.86 million members; 3) the ***Disabled American Veterans***, § 90, with 1.2 million members; 4) the ***Vietnam Veterans of America***, § 3801, *et seq.*, with 50,000 members; 5) the ***Catholic War Veterans, USA, Inc.***, § 2601, *et seq.*, with 30,000 members; 6) the ***Military Order of the Purple Heart***, § 821, with 30,000 members; 7) the ***American Ex-Prisoners of War***, § 2101, *et seq.*, with 27,000 members; 8) the ***Blinded Veterans Association***, § 851, *et seq.*, with 10,200 members; 9) the ***Paralyzed Veterans of America***, § 1151,

1. The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel, made any monetary contribution to the preparation and submission of this brief.

et seq., with 20,500 members; 10) the ***Italian American War Veterans of the U.S.A.***, § 1701, *et seq.*, with 10,000 members; 11) the ***American War Mothers***, § 91, with 1500 members; and 12) the ***Legion of Valor of the United States of America, Inc.***, § 631, *et seq.*, with membership restricted to recipients of the Congressional Medal of Honor, Distinguished Service Cross, Navy Cross, or Air Force Cross.

Amici also include the following unchartered organizations: 1) ***The Military Officers Association of America***, with 387,000 members; 2) the ***Fleet Reserve Association***, with 170,000 members; 3) the ***Non Commissioned Officers Association***, with 65,000 members; 4) the ***Enlisted Association of the National Guard of the United States***, with 85,000 members; 5) ***The Veterans of the Vietnam War, Inc.***, with 10,000 members; 6) the ***Military Chaplains Association***, with 1,600 members; 7) the ***National Association of Military Widows***; 8) the ***New Jersey Agent Orange Commission***; 9) the ***Oklahoma Agent Orange Foundation***; and 10) the ***Agent Orange Victims and Widows Support Network***.

Amici do not idly request that this Court affirm the Second Circuit to permit these veterans access to justice. Many *Amici*, especially the American Legion and Vietnam Veterans of America, for decades have actively pursued scientific research or have assisted others in developing scientific information concerning the health effects on Vietnam veterans of their exposure to Agent Orange and dioxin. *Amici* have also petitioned Congress to authorize scientific studies regarding exposure to herbicides. As the average 20 year latency period for certain causally related injuries, such as cancer, passes, these studies are now creating a body of evidence that leaves little doubt that these Vietnam war veterans were injured by Petitioners' defective products in the process of serving our country.

STATEMENT OF FACTS

Dan Stephenson and Joe Isaacson are Vietnam veterans who honorably served their country during wartime. Although both were exposed to Agent Orange, a potent combination of 2,4-D and 2,4,5-T and their highly toxic contaminants, dioxins and furans, both were leading normal, healthy lives in 1984, with no thought or expectation that they might one day be stricken with deadly cancers caused by their wartime exposures to Agent Orange.

Because they had no reason to know that they would ever suffer any disease from their exposures, and at that time had no injury from their exposures, they had no reason to know or receive notice that there was a class action certified on behalf of veterans who claimed injury from their exposures to Agent Orange. Likewise, when the class action was settled in May of 1984, neither learned of that settlement or would have had any reason to know of it. Neither knew that the definition of the class for purposes of the settlement had been expanded to purportedly include veterans like themselves, who had no injuries then, but who might suffer them in the future. Nor did they know that although the first class that was certified, which did not include them, provided for an opt out period, the second class for settlement, which purported to include them, did not. The purported future claimant class that was settled in May 1984 was not the same class that was certified in December 1983.

The only opt out rights that were provided to any veteran was a right to opt out of the originally certified class which was limited to "persons injured" or "persons claiming injury" from exposure to Agent Orange in Vietnam. JA 84-85. Because neither Isaacson nor Stephenson claimed any injury, indeed had no legally cognizable injury at the time this notice went out, they were not members of that class, nor did they receive notice of the class certification and opt out deadline. They thus did not opt out and had no reason to.

It is critical to point out that the class that was certified only included persons who actually claimed manifest injuries **because the Petitioners insisted on it** and the District Court

agreed. At a hearing before the Special Master, in August of 1982, more than a year before class certification, the plaintiffs' attorney unsuccessfully tried to have the class broadly include everyone who was in the armed services in Vietnam and exposed to Agent Orange, potentially up to 2.4 million people. JA 57, 63, 67. Lawyers for the Petitioners made it clear to the court that any such class definition was improper and failed to meet the requirements of Rule 23. JA 48, 58-60. The lawyer for Monsanto insisted that: "to the extent that they plead a claim on behalf of people that are not sick, that is not a claim upon which relief can be based. It is a defective claim. It should be dismissed." JA 60.

Although the attorney representing claimants refused to give up making claims for persons simply based on exposure, without manifest injuries, it is apparent from the record that the Special Master hearing these arguments was critical of that position and not persuaded.[2] JA 62. At that hearing attorneys for Dow pointed out that if the plaintiffs' theory about the class were proper that would mean that individual notice would have to go out to every one of the supposed 2.4 million that served in Vietnam. JA 56-57. And, of course, that never happened.

Class Certification And The Settlement Class

A class was conditionally certified by Judge Pratt on December 29, 1980. *See In re Agent Orange Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1986). That class was defined as including "persons who claim injury" from exposure to Agent Orange. *Id.* at 787-792. Judge Pratt expressly declined to do any analysis whether the Rule 23(a) requirement of adequacy had been met by the class representatives because no class representatives had yet been identified. *See id.* at 787-88.

The class was finally certified by Judge Weinstein in December 1983. In the class certification order the class was

2. At one point the Special Master skeptically pointed out that the attorney's claim of a broad class membership for even at risk claimants was adverse to the exposed veterans' interest because it created statute of limitations problems for those individuals who had not yet any manifest disease or injury which might eventually bar their recovery. JA 67.

defined as persons "who were injured" while in Vietnam by exposure to Agent Orange or other phenoxy herbicides, JA 107, *see In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983), and the notice was designed to catch the attention of persons who "claim injury . . ." *Id.* at 734. Judge Weinstein did no independent analysis of whether the adequacy requirements of Rule 23(a) had been met. Rather, he merely cited to Judge Pratt's earlier order, and stated that "[t]he four prerequisites as they applied to this litigation have already been carefully analyzed by the court and found to exist." *Id.* at 721. Once again, an evaluation of adequacy would have been impossible since the class representatives still had not been identified.

The opt out period for that class ended on May 1, 1984. On May 7, 1984, Petitioners and lawyers representing veterans who actually had injuries settled the original Agent Orange cases, and in doing so, re-defined and vastly broadened the definition of the class to include persons who had not even manifested an injury. JA 88, 96. However, in contrast to the class certification notice with the narrowly defined class which did not include Respondents, the notice of class settlement to the much broader purported settlement class contained no opt out right at all. JA 96, 106-109. Petitioners are therefore misleading when they state that all class members had notice of the settlement and the right to opt out. Pet. Br. 35. The class that was certified did not include Respondents who had no reason to "claim injury" and the right to opt out of that class was gone by the time the settlement was reached. Stephenson and Isaacson only arguably fit within the definition of the purported class when it was re-defined, after the opt out time had ended. JA 129-132.

Petitioners state that persons in the settlement class had notice of the settlement. What they do not state is how the notice of the settlement was broadcast much more narrowly than the notice of class certification, even though the settlement class was defined much, much more broadly than the certified class. The certified class provided notice by television and other broadcasting media, as well as direct mail and newspaper, while

the settlement class was provided notice only by direct mail and print media. *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 763 (E.D.N.Y. 1984). The broad reach of television was bypassed. Although, while broadening the class definition, the Petitioners and plaintiff lawyers thus reduced the amount of notice that was given.

Neither Stephenson nor Isaacson received notice of the settlement class that purportedly now included them. Even if they had wanted to, without notice, they had no chance to litigate or object, and they were denied any right to opt out of the settlement.

It is again critical to point out that lawyers for Petitioner chemical companies knew before the class was certified that there would be great Due Process problems if the class definition changed after the notice of certification. The lawyer for Diamond Shamrock argued that if, after the notice went out, the class definition changed, and some people were no longer included, then there would be "serious dangers of prejudice" to people who relied on the notice. JA 83. Of course, the opposite situation, as here, would be equally dangerous and prejudicial. Because of the change in the class definition after the class was certified, Stephenson and Isaacson were supposedly included in the class defined for settlement without notice and without an opportunity to opt out. In effect, the class had expanded and been converted into a mandatory, no opt out class.

Petitioners suggest that Respondents' inability to opt out or object is irrelevant because the fairness of the settlement was fully litigated by persons "situated identically," Pet. Br. 32, the "risk of error is low," Pet. Br. 43, and the standard of review should thus be high. But it is indisputably not true that persons situated identically fully litigated these same issues: no one has been before the court in the identical situation before. All the class representatives at the time of the settlement in 1984 had manifest injuries. JA 80, 127, 129. All the lawyers involved in litigating any issue before the court had clients with manifest injuries. No lawyer ever appeared on behalf of veterans with unknown or speculative future claims.

In later litigation, plaintiffs Ivy and Hartman's injuries, although not present at the time of settlement, were manifest before 1994. Both therefore were entitled to compensation from settlement funds that were still available. *Ivy v. Diamond Shamrock Chem. Co. (In re Agent Orange Products Liability Litigation)*, 996 F.2d 1425, 1433-34 (2d Cir. 1993).

Again it is critical to note that before the class was certified, lawyers for Petitioners expressed clearly and unequivocally their position that certification of the class was improper because the class representatives had not even been chosen. The lawyer for Diamond Shamrock argued that without the identity of the class representatives, there could be no determination whether the adequacy and typicality requirements of Rule 23 had been met. JA 78. He argued that the class could not be certified because the court did not have enough information to make such a determination: "[W]e should ascertain a full profile of each of the representative claimants and find out if there are complaints outstanding, or which indicates there is an area not being represented." *Id.*

At the same hearing on class certification, the lawyer for Hercules argued that there was a great problem of class certification without first identifying the class representatives because without that information there could be no determination "as to whether they are representative." JA 81. He insisted that "there is no way it should proceed as a class action until the determinations have been made that they are representative." JA 82.

Despite their knowledge that Rule 23's requirements of adequacy of representation had not been met when the class was certified, and despite their knowledge that there was no class representative that was identically situated as Stephenson and Isaacson were then, without manifest injuries, lawyers for Petitioners went ahead and worked together with plaintiffs' lawyers to broadly define a settlement class to include future claimants and gave any future claimant no opportunity to opt out, even if he or she knew they were included in the newly defined settlement class. Petitioners demanded a provision that

allowed them to walk away from the settlement if too many veterans opted out. P. Schuck, *Agent Orange on Trial* 153-154 (1987); JA 96. Veterans with claims were not afforded a similar opportunity to abandon the settlement, nor an option for a back-end opt out, nor an option for a renewed opt out. *Id.* Petitioners sought to have the class as inclusive as possible, including unborn children. *Id.*

Any question why these plaintiff lawyers would collude with Petitioners and their counsel to broaden the class definition on the eve of trial to take away the rights of future claimants, who they did not represent, is answered by the record below. These lawyers were in desperate financial condition, JA 148-160, facing a trial before a judge that thought their case was weak against well heeled chemical companies. *See id.* And, as later revealed, they had entered a spurious financial arrangement that produced great incentive to settle to provide a nuisance value amount to their clients with present injuries. *In re Agent Orange Products Liability Litigation*, 818 F.2d 145, 156-57 (2d Cir. 1987).

Not only did newly included future claimants have no right to opt out of the settlement, if they had received notice they would have been told that the only issue that was to be decided at any future hearing was the "fairness" of the settlement. Nothing in the notice told them they could object to the adequacy of representation. JA 109. However, although the settlement notice told persons who received it that there was a settlement, it provided no information whatsoever about what money would be paid to whom, and for what injuries. The settlement notice only provided for claim forms to be submitted by persons who "currently" have health effects. It did promise, however, that some funds may go to claimants with future injuries after the numbers of persons with current claims was known and reviewed. JA 112. Thus, anyone receiving this notice who did not have any current known health effects would not have any way to submit a claim or have any knowledge of what the settlement would provide to him or her in the future.

For veterans such as Stephenson or Isaacson, even if they had notice of the settlement and understood that it included them, to take any legal action at that time to object or otherwise try to contest the settlement would have required an expenditure of time, effort and money to hire an attorney to investigate and prepare a response to the court on their behalf. Without any health problems at the time related to Agent Orange and no evidence or reason to expect that they would eventually get cancer associated with Agent Orange exposure, Stephenson and Isaacson would have had no incentive to suffer the expense of contesting the settlement. This Court has recognized this predicament for potential class members. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997). ("Even if they fully appreciate the significance of the class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.")

It is apparent from the record of the proceedings below that even if Stephenson and Isaacson had come forward and had suffered the expenses of appearing and objecting to the settlement, it would not have done them any good. The only opt out period had passed, before they were even in the class. And, in the face of overwhelming objection to the settlement from veterans, the District Court approved the settlement.[3] *Agent Orange*, 597 F. Supp. at 761.

It is also apparent from the record that when one lawyer objected to the propriety of including future claimants in the settlement class, the District Court deemed the lawyer making the argument had no standing to object to the settlement on behalf of absent future claimants because his clients had injury claims, had received notice, and most had decided to accept. JA 189-190[4] Moreover, the District Court believed that under

3. *See, e.g.* JA 134-136; *see also Agent Orange*, 597 F. Supp. at 761.

4. The Court: Are you representing those members of the class who are not your clients in this argument? That is the question that I am putting to you [?].

(Cont'd)

the settlement veterans who manifested injury later "would be entitled to compensation in the future." JA 129. The court stated that allocation under the distribution plan would have to "take of care" of the future claimants. JA 129.

When the final distribution plan was developed, submitted to the court and approved, it failed to meet the promises made by the court during hearings on the settlement. The distribution plan did not provide any money at all for veterans who might contract cancer after 1994, even though the court knew that latency periods for cancers from toxic exposure might be as long as 40 years. *See Agent Orange*, 597 F. Supp. at 795 ("[i]t took almost forty years for solid tissue cancers to develop in victims of atomic bombing in Japan").

Nevertheless, the District Court characterized the case against the chemical companies as weak at the time of the settlement due to lack of evidence of causation and fraught with difficulty due the government contractor defense. The court could not have known what the chemical companies knew about the true toxicity of their products and apparently did not fully appreciate that the science and medicine of Agent Orange was progressing rapidly and that before the settlement and distribution plan was terminated, the government contractor defenses that concerned the court would be restricted by the Supreme Court. *See Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

(Cont'd)

> Mr. Taylor: I do not believe that I can do that. I'm only representing my clients who are members of the class.
> The Court: And did you send each one of them written notice in time to opt out?
> Mr. Taylor: That is correct.
> The Court: With a suggestion that they do opt out?
> Mr. Taylor: That is correct, your Honor.
> The Court: I see.

JA 190-191.

The State Of Medical Knowledge

Because of the well known long latency periods for many diseases, and particularly cancers, from toxic exposures, the incidence of diseases and cancers in agricultural workers and in veterans exposed during their service to Agent Orange was beginning to increase rapidly, making case reports and statistical studies of these diseases more common and more likely to show an association between exposure and a particular disease or cancer. Because the chemical companies had many scientists and health care professionals on their staff, they were very aware of this growing association between these chemicals and cancer. They had to know when they settled the pending Agent Orange litigation in 1984 that the body of medical evidence of this association was increasing. *See generally* JA 137-44, Welch Affidavit, JA 294-99. That gave them great incentive to push the settlement to include, and preclude, claims of future victims.

The first public knowledge of the herbicide-cancer linkage came from Sweden with clinical reports in the late 70's by Hardell and others. Ericksson, Hardell, *et al.*: "Case Control Study on Malignant Mesenchymal Tumors of the Soft Tissue and Exposure to Chemical Substance" Lakartidningen, 76:3872-75 (1979). Dow in particular was very aware of this work. These were followed with epidemiological studies by the same author and his group. Hardell: "Case Control Study: Soft Tissue Carcinoma and Exposure to Phenoxyacetic Acids or Chlorophenols" Br. J. Cancer, 39:711-717 (1979). In the United States, the Journal of the American Medical Association published in September 1986 a report of a study of Kansas farmers exposed to herbicides. The study found that there was a statistically significant dose response relationship between the number of days sprayed and an elevated cancer risk. The risk of Non-Hodgkin's Lymphoma — the same disease Joe Isaacson suffers — greatly increased for those who reported exposures for more than 20 days per year. Hoar, *et al.*, "Agricultural Herbicide Use and Risk of Lymphoma and Soft-Tissue Sarcoma" J. AMA, 256:9, 1141-47 (1986).

By 1992 there was a consensus that there was a positive association between herbicide exposure and Non-Hodgkin's Lymphoma. Morrison, *et al.*, "REVIEW: Herbicides and Cancer" J. Nat. Cancer Inst., Vol. 84, p. 1866 (Dec. 16, 1992).

Finally, as a result of intense political activity by these amici and others, including individual veterans, Congress mandated the Department of Veterans Affairs retain the National Academy of Sciences to study the association of Agent Orange exposure. That study, entitled *VETERANS AND AGENT ORANGE: Health Effects of Herbicides Used in Vietnam*, Institute of Medicine, (National Academy Press, 1994), on the basis of three years of study of all available literature and research, concluded in its seminal report that the evidence was sufficient "to conclude that there is a positive association between exposure to herbicides 2,4-D, 2,4,5-T and its contaminant TCDD [dioxin] . . . and non-Hodgkin's lymphoma." *Id.* at 548. It also found that the evidence was suggestive that there was an association with multiple myeloma.

Chemical Company Knowledge Of Agent Orange Toxicity

The chemical companies had every reason in 1984 to anticipate that, as time passed, there would be replication of the early findings of Hardell and other associations would be increasingly likely as the latency periods of these diseases were being reached. Moreover, they also knew that their own internal information showed how toxic these herbicides really were.

After the Agent Orange settlement was approved, in other litigation against the same chemical companies for injuries alleged to be caused by exposures to 2,4,5-T and 2,4-D, documents have been produced which show that Dow and other manufacturers were engaged in a cover-up to keep their knowledge of the severe toxicity of these phenoxy herbicides a secret from the government and the public, and particularly to hide their knowledge of the contamination of these products with dioxin. *See, e.g., Sternhagen v. Dow Co.*, CV-88-158-GF-PGH (D. Mont.).

Dow documents show that Dow had knowledge of serious health risks posed by chlorinated hydrocarbons long before it sold Agent Orange to the government to use in Vietnam. Dow had knowledge since the 1940s that chlorinated herbicides were toxic to humans and animals.[5] Internal memoranda describe Dow's history of toxic problems with its chemical herbicides acknowledging numerous chloracne outbreaks in various herbicide production facilities over the years. Report from Widger to Coulter, Midland Division Research and Development, 4/25/67. Most notably, that report also made clear that the problem was more than a simple skin rash: ". . . we must keep in mind that chloracne is cosmetic evidence of the attack and serious liver damage is an invisible effect of the attack." *Id.*

An internal Dow 1965 report found that "The materials known to cause chloracne in humans are usually chlorinated complex organic molecules." Larry Silverstein, "The Chloracne Problem – Biochem's Contribution." Bates No. 0001 112 (March 10, 1965). Dow's scientists specifically stated that one of the chemicals apparently causing chloracne was an impurity in its herbicides, namely dioxin. The report stated: "This compound (dioxin) and others which have been shown to cause chloracne have also been shown by animal tests and some human experience in other companies to produce liver damage if the exposure is more extensive." *Id.*

Dioxin was not then unknown to Dow and other chemical companies. In 1957, the German chemical company, Boehringer, had written to Dow offering information about the "very, very toxic" chemical dioxin, about chloracne, and about the preparation of trichlorophenol. Letter from Dr. Wey, C. H. Boehringer Sohn, to Dow Chemical Company, Attn: Leonard Rivkin (Feb. 11, 1957); *See also* Silverstein, Biochem's Contribution.

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5. One of the head toxicologists for Dow for 50 years, V.K. Rowe, has admitted in a deposition in other litigation, *Keister v. Dow*, 723 F. Supp. 117 (E.D. Ark. 1989), that Dow conducted research in the early 1940s on animals to determine the toxicity of certain of these compounds.

During the 1960s while having trouble with chloracne outbreaks, Dow decided to conduct a series of meetings "to share our findings" with other herbicide producers about the toxicity and impurity problems with its chlorinated herbicides. In a letter to the technical and medical people at Monsanto, Hooker Chemical, Diamond Alkali and Hercules, V.K. Rowe from Dow invited them "to come to Midland to discuss the toxicological problems caused by the presence of certain highly toxic impurities in certain samples of 2,4,5-T and related materials." Letter of V.K. Rowe, Dow Chemical Co., to Monsanto, Hooker Chemical, Diamond Alkali and Hercules, (Mar. 19, 1965). At a meeting in Midland on March 24, 1965, Dow shared with other producers "the medical side of the Dow experience." At the meeting Dow showed slides from animal tests. Its scientists shared techniques for doing chemical analysis for dioxin and other impurities and discussed industrial hygiene measures. V.K. Rowe, Dow Chemical Co., "Report on the Chloracne Problem Meeting on 3/24/65" (Mar. 29, 1965).

During this same time, Dow was sharing samples of its products with other producers and testing and analyzing other producers' products. For example, in a letter to Paul Hoffman from Dr. R. Emmet Kelly (medical director at Monsanto Chemical Company), dated March 17, 1965, Kelly described receiving a sample of dioxin from Dow which was described as "the most toxic compound they have ever experienced." Letter of Dr. R. Emmet Kelly, Monsanto, to Dr. Paul Hoffman (Mar. 17, 1965).

While sharing chemistry and toxicological information with its American counterparts, Dow was also working with European herbicide producers to learn how to reduce the impurities in its chemical production. Internal Dow documents indicate that in late 1964, Dow had an agreement to obtain from Boehringer a secret report about chloracne active substances in chlorinated herbicide production as well as operating procedures to reduce them. Letter from Dr. Kudszus and Dr. Merz, C. H. Boehringer Sohn, to Dow Chemical Co. (Dec. 15, 1964).

Although the focus of Dow's research in the 1960s was on 2,4,5-T, Dow documents show that since the 1940s it has known that 2,4-D was also highly toxic and that 2,4-D and other dichlorophenols were associated with chloracne. Chloracne was not just associated with the trichlorophenols. A 1945 report on the handling hazards of 2,4,5-T compared it to 2,4-D and in some regards found 2,4-D to be even more toxic. Dow Chemical Co., "Toxicity of 2,4,5-Trichlorophenoxy Acetic Acid" (Aug. 8, 1945). Other reports from Dow Biochemical Research concerning the chloracne problem at the Dow plant in Fort Saskatchewan, Doe researcher Larry Silverstein found that 2, 4-dichlorophenol salts showed slight to moderate chloracnegenic activity and that laboratory studies on decomposition of chlorinated phenols indicated "definite possibility of an acne hazard from overheated or decomposed materials." Larry Silverstein, Dow Chemical Co., "Chloracne Problem at Fort Saskatchewan Plant, Dow Chemical Canada" at Dow Bates No. 746402 (Mar. 21, 1969).[6]

SUMMARY OF ARGUMENT

The Agent Orange settlement was legally and factually unprecedented then and remains so today. For veterans such as Dan Stephenson and Joe Isaacson who were healthy, and without any injury at the time, this class action settlement purported to bind them, without adequate representation, without any right to opt out and without payment of any compensation because their injuries became manifest after the settlement funds had been disbursed. Petitioners knew full well that trying to reach so far in binding absent parties, who did not yet even have causes of action, was not supported by any precedent or other authority and violated the constitutional requirements of Due Process and standing. Nevertheless, in the face of the known, overwhelming flaws in their purported settlement, Petitioners went ahead and entered an agreement with lawyers for plaintiffs who were desperate and had strong financial incentives to settle.

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6. These Dow internal documents suffice to defeat any government contractor defense. *See Boyle*, 487 U.S. 500.

When they entered that settlement Petitioners knew also that medical evidence was likely to increase as the latency periods for cancers and other diseases were being reached from exposures to their toxic chemical products. They knew from their own internal studies that the herbicides used in Agent Orange were highly toxic and were contaminated with one of the most toxic materials then known, dioxin.

Despite entering this settlement with full knowledge of its legal and factual flaws and full knowledge that it was likely that there would be many future provable claims, Petitioners assert that it would be unfair to permit review of this settlement now. But the passage of time and the payment of nuisance value money to veterans who had claims then does not, and cannot, alleviate the severe Due Process violations to Respondents who have claims now. Petitioners' pleas for fairness ring hollow in the light of their knowing violation of the rights of future claimants such as Respondents.

The Second Circuit decision is based on well settled principles of class action jurisprudence and merely followed the guidance of this Court from Amchem and Ortiz. Those decisions, too, broke no new legal ground, despite Petitioners suggestions to the contrary. The dominant Due Process concern of this Court in reviewing class actions has always been to protect the rights of absent class members to ensure that they are not unfairly bound to judgements or settlements by class representatives with interests that are not aligned with theirs. Adequacy of representation is the cornerstone of these Due Process principles in this context. It cannot seriously be disputed that these veterans who had no cognizable claim at the time, who could not opt out, and who could receive no compensation when their injuries became manifest, did not have adequate representation of their interests. As such, the decision of the Second Circuit must be affirmed and Respondent veterans be permitted to proceed with their claims.

ARGUMENT

I. Because Petitioners Knew At The Time Of Settlement That It Was Unprecedented And Severely Flawed, That It Violated The Due Process Rights Of Absent, Future Claimants, And Failed To Satisfy The Requirements Of Rule 23, Petitioners Cannot Now Claim That They Had A Right To Rely On That Settlement And Expect Finality And No Collateral Review When Veterans Made Claims For Diseases That Developed After 1994

The 1984 Agent Orange settlement which purported to include future claimants such as Respondents did not meet the requirements of Rule 23 violated Due Process because veterans like Stephenson and Isaacson, who had no manifest injury, were not adequately represented by someone with interests identical to theirs, had no notice of the settlement, and had no right to opt out. They were purportedly bound to a settlement and precluded from pursuing their rights to their claims in the future, but no compensation was provided.

It is axiomatic that before one can plead for fairness and equity, one must come to the bar with clean hands. Petitioners do not have the "clean hands" that would give them a right to claim that it would be unfair to them now to affirm the Second Circuit and allow Respondents their day in court.

The record of the litigation leading up to the Agent Orange settlement shows that until they jumped at the chance to settle all present claims for nuisance value and to bind and preclude all future claims for little or no compensation, Petitioners, through their counsel, had vigorously — and properly — objected to inclusion in the class litigation of people without present injuries or manifest symptoms. They knew that veterans who were exposed to Agent Orange, but who did not have any manifest injuries could not have brought a claim to begin with. Persons without injury would have had no standing under Article III of the United States Constitution to bring a claim at all. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) this Court established an "irreducible constitutional minimum of

standing" which requires that "the plaintiff must have suffered an 'injury in fact' — an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" (Citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975) and others).

Without injuries and standing to bring a claim, any claims would have been dismissed. Petitioners knew that the they were getting more from the settlement than they had any right to expect. They were settling claims that could not have been brought in the first place. As Judge Friendly said in *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952):

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted as a sort of logical axiom that a statute of limitations does not begin to run against a cause of action before that cause of action exists.

It is only in that same topsy-turvy land that your claims can be settled by others, without your knowledge, for no compensation, before your cause of action exists.

Petitioners knew the settlement of future claims under these circumstances was unprecedented. They had to know that such a settlement was at risk due to the many problems it had in meeting those requirements of Rule 23 which are intended to protect the due process rights of absent class members. *See, generally, Amchem*, 521 U.S. at 625-629.

This Court has previously held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). In a class action for money

damages, rights to receive notice and the subsequent ability to opt out of the class cannot be abridged: "[W]e hold that due process requires **at a minimum** that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).[7]

Settlement classes, in any setting, present serious potential for abuse. *See, e.g.*, Manual for Complex Litigation, Second, *supra*, § 30.41, at 236 ("As a practical matter, the dynamics of class action settlement may lead the negotiating parties — even those with the best of intentions — to regard the interests of the class members too lightly."). Indeed, all participants in class action settlement negotiations have extraordinary incentive to settle. From the perspective of defendants, settlement is an opportunity to cap risk. From the perspective of the courts, settlement may be an

7. Indeed, few activities are subject to more extensive record keeping than military service; if the rights of future claimants can be abolished in this context without individualized notice, then the implications are unlimited. By contrast, in an early decision regarding Rule 23 requirements, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), this Court demonstrated the full extent to which the rights of individual class members must be safeguarded. *Eisen* raised the issue of adequate notice in a Rule 23(b)(3) antitrust and securities class action with millions of members and a class representative with only a $70 stake. Despite the size of the individual claims, this Court held that the class could proceed only with individual notice to more than two million class members whose names and addresses could be identified with reasonable effort, holding that "[i]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." Significantly, the Court in *Eisen* stated that such notice was required so that each individual class member "may request exclusion from the action and thereby preserve his opportunity to press his claim separately. . . ." *Id.* at 176. *See also Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351 (1983) ("*Eisen's* notice requirement was intended to inform the class member that he could 'preserve his opportunity to press his claim **separately**' by opting out of the class." (emphasis in original)).

opportunity to clear court calendars of tens of thousands of cases. And, not least of all, from the perspective of class counsel, the economic rewards of settlement sooner rather than later can be extraordinarily enticing — regardless of the inchoate needs of absent class members or future claimants. For these reasons, adequate representation of absent claimants has become one of the cornerstones of due process guarantees in class actions, requiring, among other things, that class representatives and their counsel are aligned identically with the interests of absent class members. As this Court emphasized in *Hansberry v. Lee*, 311 U.S. 32, 45 (1940):

> [S]election of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

The record of the litigation leading to the purported class action settlement of future claims demonstrates the risk of conflict and collusion which arises when both sides no longer are adversaries but both now want the settlement to proceed. That is precisely when adequacy of representation becomes crucial and all members of the settlement class must have their day in court. As this Court has stated:

> Procedural due process is not intended to promote efficiency . . . it is intended to protect the particular interests of the person whose possessions are about to be taken. . . . '[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize

> praiseworthy government officials no less, and perhaps more, than mediocre ones.'

Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) (*quoting Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).[8]

Petitioners knew that when the class was certified there was no analysis of the adequacy of the class representatives. Class representatives had not even been named. Petitioners knew, too, when the class action was settled that there were no class representatives to represent persons without any manifest injury — like Stephenson and Isaacson — who had been added to the broadly re-defined class after the opt out deadline passed.

Petitioners knew it was dangerous to change the class definition after certification and the opt out period had passed. Despite their misleading representations to the Court in their brief, Pet. Br. 35, they knew that persons like Respondents here, with future claims, never had a chance to opt out at all. They knew that even though the class definition had been broadened after the opt out time had passed, the methods of distribution of the notice would reach much fewer veterans.

Each of the Petitioner chemical companies also had their own staff of scientists and toxicologists and internal documents show Petitioners were well aware of the toxicity of the herbicides used in Agent Orange. Documents of public record in later herbicide litigation show a many year pattern of cover-up about their knowledge of the toxicity of 2,4,5-T and 2,4-D and the presence of toxic impurities and contaminants such as dioxin in their herbicide products.

They had to know of the long latency periods often required for development of cancer and other fatal diseases from exposures to toxic chemicals. Even the District Court was aware of that. Thus, with the passage of time since the first agricultural and production uses of these herbicides, Petitioners had to know that it was likely there would be increasing incidence of disease

8. *See also In re: General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1133 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) ("convenience and expediency cannot justify disregard of the individual rights of even a fraction of the class").

and increasing knowledge of the potential association with their herbicides.

Thus, while the plaintiffs' lawyers had limited resources and great incentive to settle, the chemical companies knew that they needed this protection because they knew they had a ticking time bomb of medical and other documentary evidence that would be generated, or come out of their files, to establish causality by the time that future victim's medical conditions associated with Agent Orange exposure developed.

They therefore took a risk. They took the risk that for payment of a sum of money to provide nuisance value settlements to persons with present claims, that they could also buy the rights of unsuspecting future victims to have their day in court, if and when an Agent Orange associated disease became manifest.

They cry that they bought their peace, but they should have known then that it was a defective peace. They cannot have a legitimate expectation of peace when they knew how utterly flawed the settlement was and how unprecedented it was to impose a mandatory class on future claimants that provided no compensation at all if the claimant had the misfortune of having his or her disease manifest after 1994.

Petitioners knew that they had no legal bases to take those rights from the unsuspecting future victims of their wrongdoing. Nevertheless, they did so and had nearly 20 years of peace. But they were not bona fide purchasers of these rights. They can have no legitimate claim to have bought a peace when they knew that the peace was flawed.

II. Petitioners Had The Right And Duty To Attempt To Cure The Defects They Knew Flawed This Settlement

Amici doubt that there is any way consistent with Due Process and Rule 23 to cure defects in a class action settlement that includes future claimants without any present injury, who have no right to opt out, who have no notice or opportunity to object and who receive no compensation. Petitioners conceded in court, several years before the settlement was reached, that they, along with the court and plaintiffs' counsel had an

obligation to ensure that any class action was fair to the absent class members. JA 50-60. Contemporaneous case law confirms that Petitioners had standing to ensure that the class action complied with the rules and due process. *See Shutts*, 472 U.S. at 798.

Despite their vigorous — and well taken — objections to the broad and pervasive class that the plaintiffs in the Agent Orange litigation sought to have certified, and despite their obvious knowledge of other deficiencies in the settlement, Petitioners did nothing to correct these flaws. Petitioners could have protected themselves against the prospect of collateral attack of the settlement by maximizing the protections for absent class members. They could have insisted that better notice to the broader class be given. They could have ensured that there was adequate representation for each new subclass of persons that had been brought into the class by the re-definition for settlement. They could have provided funds to pay the cost of separate representation for this subclass, or at least required that a small fraction of the $180 million be designated for that purpose.

When Judge Weinstein indicated that he did not want to water down the available money by paying for multiple counsel, Petitioners could have volunteered to pay more if they wanted protection. They could have paid for more notice or sought to have it come out of the settlement proceeds.

Most importantly they could have made sure that there was another opportunity for opt out provided for future claimants after their injuries became manifest. Because they failed to do anything then to satisfy the requirements of Due Process and Rule 23 for their settlement, Petitioners are complicit in its fatal flaws. They had a chance to do what was necessary to try to protect the settlement, but they did nothing and should not now be heard to complain that it is subject to collateral review.

III. AMCHEM AND ORTIZ DID NOT CHANGE THE WELL SETTLED DUE PROCESS PRINCIPLES UNDERLYING THE REQUIREMENTS OF RULE 23 WHICH HAVE ALWAYS REQUIRED THAT CLASS REPRESENTATIVES SHARE IDENTICAL INTERESTS WITH ABSENT CLASS MEMBERS BEFORE THE ABSENT MEMBERS CAN BE BOUND

Petitioners charge it would be unfair to apply a new standard of review to their 1984 Agent Orange settlement based on what they claim is a major change in the law of class actions after the settlement was approved in 1985. They contend that *Amchem* and *Ortiz* changed the law and thus should not be applied retroactively. That characterization of *Amchem* and *Ortiz* is simply wrong. Indeed, what Petitioners are doing is trying to excuse their own complicity in the failures of the 1984 settlement. Petitioners knew in 1984 that the settlement for future claimants failed to meet the requirements of Rule 23 and Due Process. Those requirements were well known to them then and they argued for them at the time during the certification hearings. However, now that they are trying to defend this flawed settlement they want this Court to believe that somehow *Amchem* and *Ortiz* added some new requirements for approval of class settlements that should not be applied with hindsight.

Review of those cases shows clearly that both decisions were grounded on prior precedent that had been well settled for years before 1985. The only new aspect of either case was that for the first time the Court was asked to apply these well settled Due Process principles to a class action where lawyers for plaintiffs and defendants had agreed to settle both present and future claims as a part of a single class action. Nearly 50 years before the Agent Orange settlement was made and approved, this Court set forth clear guidance about the Due Process principles applicable to class actions. In *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), the Court stated at the outset that before prior litigation will be deemed to have res judicata effect on later suits the Court must perform a collateral review of both cases to ascertain whether the litigant has been afforded such

notice and opportunity to be heard as are requisite to the due process clause. (Citing *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 273 (1914)).

This Court then explained that class actions suits were an exception to the general rule "in Anglo American jurisprudence that one in is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Id.* Class actions were developed in equity as an exception to that rule where the number of parties is so great that joinder is impracticable. However, *Hansberry* set forth very clearly that for this exception to be constitutionally valid, the procedures for creating and litigating the class claims must ensure that the interests of the absent members and the class representatives are the same so that the latter fairly represents the former. Due Process has not been met when the procedures adopted do not ensure protection of the absent parties interests. *Id.* at 42.

Adequate representation is at the core of these constitutional concerns. Absent parties would be bound only if "the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest." *Id.* at 41. Conflicting interests among class representatives and absent class members "does not afford that protection to absent parties which due process requires." *Id.* at 45. Indeed, more than 50 years ago now, this Court expressed its strong concern that where there were such conflicting interests: "It would afford fraudulent and collusive sacrifice of rights of absent parties." *Id.*

Subsequently the Rules Committee adopted the numerous specific requirements of Rule 23. In both *Amchem* and *Ortiz* this Court showed that those requirements were bottomed on these same due process concerns. The principles articulated in *Hansberry* have thus been repeatedly re-affirmed both before 1985 and after.

In *Amchem*, the inquiry into the propriety of a future class began by looking at the historical roots of class actions under Rule 23. This Court found that the drafters of Rule 23 "had

dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem*, 521 U.S. at 617 (quoting Kaplan, Prefatory Note 497). This Court cited with approval language from a recent Seventh Circuit opinion:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Id. (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

In *Amchem*, this Court affirmed that in evaluating the propriety of any class action the dominant concern is that there must be sufficient unity so that absent members of class will be bound by representatives decision. *Amchem*, 521 U.S. at 621. The Rule 23 predominance requirement is not satisfied by simply shared exposure or by common interest in compensation without trial. *Id.* at 624-25. Focus must instead be on questions that are actually at issue and which create a genuine controversy. *Id.* Class representatives are not adequate under Rule 23 and due process when there are real or potential conflicts of interest. *Id.*

In affirming these well settled principles, this Court relied on case precedent that largely antedated the approval in 1985 of the Agent Orange settlement. The Court pointed out that the adequacy inquiry serves to uncover conflicts of interest. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58, n.13 (1982). The inquiry focuses on whether the injuries of the class representatives and the absent class members are the same or diverse. *See also East Texas Motor Freight System v Rodriguez*, 431 U.S. 395, 403 (1977) ("[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.")

In *General Telephone* this Court found that "[t]he class-action device was designed as 'an exception to the usual rule that litigations is conducted by and on behalf of the individual named parties only.'" 457 U.S. at 155 (quoting *Califano v. Yamaski*, 442 U.S. 682, 700-701 (1979). When issues are common and result turns on questions that are applicable in the same manner to each member of the class, then class action saves resources and permits economical litigation. *Id*

In *Ortiz* the Court pointed out that *Hansberry* had articulated a core constitutional requirement that "the named plaintiff at all times adequately represent the interests of the absent class members." (citing *Shutts*, 472 U.S. at 812 (citing, in turn, *Hansberry*, 311 U.S. at 42-43, 45)).

Similarly, in *Shutts*, the Court relied extensively on *Hansberry*, finding that in 1985 the same constitutional principles were applicable and the same practical bases for class actions remained: class actions are proper where there are too many plaintiffs for proper joinder and class actions permit "the plaintiffs to pool claims which would be uneconomical to litigate individually." 472 U.S. at 809. The Court, based on *Hansberry*, held that Due Process requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Id.* at 809-10.

Class action litigation developed as an exception to general rules requiring individual standing and litigation to provide a means for individuals with small claims to join together, when joinder was impractical, to make pursuit of justice economically feasible. It was not developed, as Petitioners suggest, simply to provide defendants in litigation "utility," Pet. Br. 17, as a device to resolve masses of claims at one time, thereby binding many absent class members at the same time. While binding absent class members to a settlement or judgment is a necessary corollary to allowing persons with sufficiently similar claims to aggregate them in a class, it was not the reason that class actions developed. In fact, it is this binding of absent members which has consistently troubled this Court for many years from a constitutional and Due Process perspective. Consistent with

the Due Process elements in the determination of adequacy under Rule 23, class representatives can only bind absent class members when their interests in the real issues in controversy are sufficiently identical to permit the conclusion that those representatives will aggressively advocate for the absent class members, without conflict.

In all the above cases decided during or before 1985, the Supreme Court rejected class action certification or settlement because the class representative's interests were not sufficiently aligned with absent class members. Thus, it is entirely disingenuous to suggest that *Amchem* worked some sea change in class action law. With the highest quality lawyers representing them in 1985, Petitioners had to know that there were fatal adequacy and due process problems with a settlement of future claims, with no opt out right, and no class representative or counsel in court who could adequately represent their interests: someone who was without conflict of interest and whose interest and injuries were identical. Petitioner had to know in 1985 that it was a well settled and fundamental principle of class action law that the absent parties cannot be bound by such a class action settlement. It is not *Amchem* and *Ortiz* which worked a change in the law, it is Petitioners' unprecedented settlement which, if upheld to bind Stephenson and Isaacson, would radically alter this Court's prior class action jurisprudence.

IV. Any Unfairness That Would Result To Petitioners By Affirming The Second Circuit Pales In Comparison To The Unfairness To Respondent Veterans If This Court Should Reverse More Than 50 Years Of Settled Class Action Precedent And Deny Them Their Day In Court

Veterans of the armed services of the United States who served in Vietnam dedicated ~~their~~ hearts, minds, and bodies to protect the rights of all citizens of this country, to uphold the way of life of this country and the constitution of the United States. No group of citizens has a greater right to expect that in return for their dedication to preserving these rights, they would be able to enjoy for themselves the full protection of the laws of this country. Veterans have a right to rely on the judicial system

of our democratic and constitutional government and, in particular, their right to their day in court to have wrongs done to them while on active duty addressed fairly and fully, with zealous advocates fighting for them and them alone. What veteran would have expected that he or she could lose all rights to their day in court, **without any compensation**, as a result of a long ago class action settlement about which he or she had no knowledge or notice and no opportunity to opt out.

In *Ortiz* this Court took note of the tension between class actions, which can usurp the rights of absent class members to a trial by jury and "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quotation omitted). "Although 'we have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' . . . the burden of justification rests on the exception." *Id.* Petitioners have not met that burden.

In *Marbury v. Madison*, Chief Justice Marshall asked: "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?," *Marbury v. Madison*, 1 Cranch 137, 162, 2 L. Ed. 60 (1803). Chief Justice Marshall's response was clear: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* at 163, 2 L. Ed. 60.

Petitioners lament the "pernicious" effects that will result to the "utility" of the class action device if this Court affirms the Second Circuit. They claim that no class action settlement will ever be safe from attack, and finality and resolution of claims will never be achieved. This view of class actions that underlies Petitioners' argument turns class action law on its head. The class action "device" was not developed to protect wrongdoers who could, with one collusive settlement, sweep away all past and future liability.

Petitioner chemical companies plead that it would be unfair to them now after they have paid their money in reliance on an expectation of finality to allow Stephenson and Isaacson to proceed on their claims. These pleas for fairness ring hollow in the light of Petitioners knowledge of the fatal constitutional and Rule 23 flaws in that settlement and their knowledge of the toxic properties of their products that were sprayed indiscriminately and in massive quantities during the Vietnam war.

In contrast, veterans like Stephenson and Isaacson who survived the bullets and bombs of the enemy, are now suffering life threatening diseases, or are dying, without any chance of redress, even though they had no injuries at the time of the settlement and no basis therefore for making a claim then. How fair is it to these veterans that Petitioners want them to lose all right to have their day in court without compensation when they had no right to opt out of the expanded class for settlement and received no notice of the class settlement at all? How fair could it be, even if they had received notice, to require these veterans to intelligently evaluate the prospects of litigating the case for their injuries when their injuries had not yet manifested? How fair is it to require veterans without then a vested claim — a concrete injury in fact– to bear the expense in time, effort and money to investigate and litigate the propriety of a settlement which may never apply to him?

Given this expense there would be no reason that a then totally healthy veteran would choose to bear that expense on the speculative possibility that at some future time he might get some sickness from a long before exposure. While finality is certainly a proper goal of class action litigation that must be respected, it must not come as a result of violations of Due Process.

CONCLUSION

For all the foregoing reasons, *amici* respectfully pray this Court affirm the judgment of the Court of Appeals for the Second Circuit.

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IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Amicus curiae Trial Lawyers for Public Justice addresses the following issue:

Whether the failure of the proponents of the Agent Orange class action to issue adequate notice to class members who had only unmanifested, "future" injuries provides an alternative basis for refusing to preclude absent class members with such injuries from pursuing claims for such injuries after they developed.

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INTEREST OF THE *AMICUS CURIAE*

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses.[1] Litigating in the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

As part of its efforts to ensure the proper working of the civil justice system, TLPJ has established a Class Action Abuse Prevention Project dedicated to monitoring, exposing, and preventing abuses of the class action device nationwide. Through this work, TLPJ has become especially concerned about efforts by corporate defendants to use the class action device as a tool for capping their liability in mass tort cases and depriving injured victims of their rights. One means to this end is to expand the scope of a class action to include not just those individuals who have known injuries from contact with the defendant's product, but all individuals who have been exposed to the product, whether or not they have yet manifested any injury or disease.

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

In this case, petitioners seek dismissal of respondents' personal injury claims based on the res judicata effect of a class action settlement reached some nineteen years ago, even though respondents had no known injury at the time of the settlement, were given no effective notice that their unknown, future claims might be decided in the class action, and received no monetary compensation from the settlement. In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) – a case in which TLPJ participated as *amicus curiae* – this Court recognized "the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given" to persons without "current afflictions." *Id.* In holding that the class action settlement at issue in this case did not preclude respondents' claim for damages, the Second Circuit cited the Court's observation in *Amchem* but declined to rule "definitively" on the issue, finding that respondents had been inadequately represented in the class action. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 n.8 (2d Cir. 2001). TLPJ files this *amicus curiae* brief to assert, as an alternative basis for affirmance, that the respondents received inadequate notice of the class action, and therefore cannot constitutionally be barred from asserting their common law claims at this time.

STATEMENT OF THE CASE

In 1984, Judge Jack Weinstein of the United States District Court for the Eastern District of New York approved a settlement of a class action brought by military servicemen who alleged that they had sustained injuries as a result of their exposure to the defoliant Agent Orange while in Vietnam. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984). The certification order and the notice to the class defined the class to include "those persons who were in

the United States, New Zealand, or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . .." *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1984). After the opt-out period expired, and after the class plaintiffs and defendants reached a settlement, the parties agreed that "[t]he Class specifically includes persons who have not yet manifested injury." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. at 865 (quoting settlement agreement). On direct appeal, the Second Circuit affirmed the district court's certification of the class and approval of the settlement. The Second Circuit did not address whether the class notice was adequate to notify persons who had no manifest injury of the pendency of the case, but approved the notice generally, finding that "[a]nyone who believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam was on notice of the pendency of a lawsuit and was thus alerted to seek advice from counsel." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Several years later, two groups of veterans who developed physical injuries after approval of the settlement brought suit against the defendants who had settled the Agent Orange class action. The district court held that the res judicata effect of the class action settlement barred the claims for damages. *Ryan v. Dow Chem. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 781 F. Supp. 902 (E.D.N.Y. 1991). The Second Circuit affirmed, holding that the veterans were included in the class definition even though they were unaware of any injury at the time of certification. *Ivy v. Diamond Shamrock Chems. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 996 F.2d 1425, 1433-34 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994). The court did not discuss specifically whether the language of the class

notice was sufficient to apprise persons without manifest injury of their membership in the class. The court agreed with the veterans that generally, "providing notice and opt-out rights to persons who are unaware of an injury would probably do little good," 996 F.2d at 1435, but held that the failure of the class proponents to do so did not amount to a due process violation. *Id.*

Four years after the Second Circuit's decision in *Ivy*, this Court considered the propriety of a class action settlement that, like the Agent Orange settlement, purported to resolve "future claims," i.e., claims of persons who had no known physical injury at the time of the settlement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997). The Court found the settlement improper because the settling parties had not satisfied the prerequisites for class certification. 521 U.S. at 613-28. Although the Court declined to rule "definitively" on the adequacy of notice to future claimants, it noted "the gravity of the question whether class-action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id.* at 628.

In 1996 and 1998, respectively, respondents Daniel Stephenson and Joe Isaacson developed cancers that their experts have linked to Agent Orange. Because their injuries did not appear until after December 31, 1994, they did not qualify for payment under the class action settlement. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1417 (E.D.N.Y. 1985), *aff'd in part and rev'd in part on other grounds*, 818 F.2d 179 (2d Cir. 1987). Neither Stephenson nor Isaacson received individual notice or otherwise learned of the existence of the Agent Orange class action until after the diagnosis of their cancers.

Stephenson filed suit to recover for his injuries in federal court in Louisiana. He named as defendants the distributors of Agent Orange that settled the Agent Orange class action and are petitioners here. Isaacson filed a similar suit in state court in New Jersey. Petitioners removed Isaacson's case to federal court, and both cases were transferred to the Eastern District of New York, where Judge Weinstein could determine the preclusive effect of the Agent Orange class action settlement on the plaintiffs' claims. Stephenson and Isaacson argued that the class action did not bar their claims because they, and all other class members who developed Agent Orange-related injuries after 1994, received inadequate representation in the class action. They also argued that they could not be bound by the judgment in the class action because the notice of the class action and the opportunity to opt out given to persons without manifest injuries was constitutionally inadequate. Judge Weinstein held that the class action settlement resolved the claims of Stephenson and Isaacson, and ordered the cases dismissed based on res judicata.

The Second Circuit vacated the order of dismissal, holding that "the prior *Agent Orange* settlement does not preclude these plaintiffs from asserting their claims alleging injury due to Agent Orange exposure" because "these plaintiffs were inadequately represented in the prior litigation." *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 (2d Cir. 2001). The court observed that "plaintiffs likely received inadequate notice," noting that this Court suggested in *Amchem* that "effective notice could likely not ever be given to exposure-only class members." *Id.* at 261 n.8. The court concluded, however, that it "need not definitively decide whether notice was inadequate" because of its finding that Stephenson and Isaacson were inadequately represented in the class action. *Id.* This Court granted certiorari.

SUMMARY OF ARGUMENT

The inadequacy of the notice of the Agent Orange class action to persons such as Stephenson and Isaacson provides an alternative basis for denying preclusive effect of the class action judgment and affirming the Second Circuit's decision. For a class action judgment to bar the assertion by absent class members of individual claims supposedly encompassed by the judgment, the class action must have provided those class members with due process, including adequate notice and a meaningful opportunity to opt out. And a court considering the res judicata effect of a class action judgment must independently assess the adequacy of the notice provided in the class action. Neither the district court that approved the Agent Orange class action settlement nor the Second Circuit that affirmed the approval considered the defects in the notice urged by Stephenson and Isaacson in this case. It is appropriate for this Court to consider whether Stephenson and Isaacson were provided adequate notice of the Agent Orange class action in determining whether the judgment in that action bars their claims.

It is clear that the notice of the Agent Orange class action did not satisfy due process requirements with respect to persons without any known or knowable physical injury. First, this Court's opinion in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), strongly suggests that, as a general matter, effective and constitutionally adequate notice of mass tort class actions cannot be given to persons who have been exposed to a toxic substance but are unaware of any injury. Both this Court and numerous state courts have held that it is unfair to require plaintiffs without any known harm to take affirmative steps to preserve their ability to bring a tort claim in the future should such injuries develop. In this case, Stephenson and Isaacson

were healthy and unaware that they had any reason for making a claim against the makers of Agent Orange at the time of their constructive receipt of the class notice. It would be intolerably unfair, and constitutionally impermissible, to hold that their failure to opt out to preserve their then-nonexistent claims effectively waived their ability to assert the claims when applicable state law permitted them to do so.

Moreover, the particular language used in the class notice was patently inadequate to alert Vietnam veterans who were unaware of any injury caused by exposure to Agent Orange that their unaccrued, future claims were at issue in the class action. The class notice was directed not to persons who were *exposed* to Agent Orange, but to persons "*who were injured* while in or near Vietnam by exposure to Agent Orange." Neither a layperson nor an expert in the field of toxic torts familiar with the decision of this Court in *Metro-North Commuter R. v. Buckley*, 521 U.S. 424, 432 (1997), would reasonably equate "exposure" with "injury." The fact that the parties to the class action found it necessary – *after the expiration of the opt-out period and settlement of the case* – to make explicit in the settlement agreement that "[t]he Class specifically includes persons who have not yet manifested injury" only highlights the inadequacy of the original class notice. Because the class notice did not sufficiently advise Stephenson and Isaacson of their membership in the class, the judgment in the class action cannot constitutionally preclude them from asserting their claims now.

Contrary to the assertion of petitioners and their *amici*, a decision affirming the Second Circuit's ruling will not impair the appropriate use of class actions to resolve the claims of persons with viable, existing causes of action. It will, instead, deter the abuse of class actions to bind future victims of a mass

tort to a global resolution of all claims without their effective knowledge and consent.

ARGUMENT

THE AGENT ORANGE CLASS ACTION SETTLEMENT CANNOT PRECLUDE THE RESPONDENTS' PERSONAL INJURY CLAIMS BECAUSE RESPONDENTS DID NOT RECEIVE CONSTITUTIONALLY ADEQUATE NOTICE OF THE CLASS ACTION.

I. To Determine The Preclusive Effect Of The Agent Orange Class Action Judgment On Respondents' Claims, The Court Must Independently Assess The Adequacy Of The Class Notice.

A. A Class Action Judgment Can Bar Subsequent Litigation Of Class Claims Only If The Class Action Satisfied Constitutional Requirements, Including Notice To Absent Class Members.

Petitioners are correct that a class action judgment, like any other judgment, can be asserted as "res judicata" and preclude subsequent assertion of the same claims by the same parties. *See* Pet. Br. 21. But the preclusive effect of a class action judgment, like that of any other judgment, is limited by the Due Process Clause. *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) (prior class action judgment does not preclude subsequent suit by class member when effect of preclusion would be to deprive class member of due process); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (denial of class members' due process rights would destroy preclusive

effect of class action judgment); *see also Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998) (for class action judgment to bar claim of absent class member, "it must be demonstrated that invocation of the bar is consistent with due process, and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process.") (citations omitted). Thus, Stephenson and Isaacson may only be barred by the class action judgment from pursuing their state law tort claims against petitioners if they were afforded due process in the proceeding that generated the judgment.

In *Shutts*, the Court described the "minimal procedural due process protection" required by the Fourteenth Amendment for a state court "to bind an absent plaintiff concerning a claim for money damages or similar relief." 472 U.S. at 811-12.[2] The Court specified that the absent class member "must receive notice plus an opportunity to be heard and participate in the litigation." *Id.* at 812. The notice must be meaningful: it should "describe the action and the plaintiffs' rights in it," *id.*, and must be "reasonably calculated, under all the circumstances, to apprise interest parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)). The Court added that "due process requires at a minimum that an absent plaintiff be

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[2] The Fifth Amendment imposes these same due process requirements on the federal courts. *Dusenbery v. United States*, 122 S. Ct. 694, 699 (2002) (right of persons whose property interests are at stake to notice and opportunity to be heard is guaranteed by both Fifth and Fourteenth Amendments); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974) (federal class action is subject to due process requirement of proper notice).

provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* Thus, unless Stephenson and Isaacson were provided adequate notice and a meaningful opportunity to opt out of the Agent Orange class action, the judgment entered in that case cannot preclude their actions for damages.

B. Petitioners Cannot Rely On The Prior Judgment Itself To Establish That Absent Class Members With No Manifest Injuries Were Provided Adequate Notice Of The Class Action.

Petitioners argue that this Court need not determine the adequacy of notice of the Agent Orange class action to find the judgment entered in that action binding on Stephenson and Isaacson because the ruling by the Agent Orange class action court that the notice was adequate is itself entitled to preclusive effect. Pet. Br. 35 n.10. But petitioners cite no authority of any kind for the proposition that a finding in a class action that class members have been adequately notified is immune from collateral attack. The proposition conflicts with the observation of the drafters of amended Rule 23 that the rule "does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can only be tested in a subsequent action." Advisory committee note to FED. R. CIV. P. 23(c)(3). It is also inconsistent with the holding in *Shutts* that a class action judgment entered without personal jurisdiction over an absent party (of which notice is an essential component) "has no res judicata effect as to that party." 472 U.S. at 805. Moreover, the notion that a finding of adequate notice cannot be attacked in a subsequent action defies common sense; it would mean that a court could declare generally that notice was adequate in the

absence of the party that should have received it, and then preclude a subsequent challenge to notice by that party as an impermissible collateral attack. As one court has observed, if a certifying court's determination that notice was adequate were to be given preclusive effect, "it would essentially mean that absent class members could never collaterally challenge a class-action judgment as violating their rights to due process, for in entering such a judgment or in previously certifying the class, a court will almost always have determined, as a prerequisite to such, that the members have been provided the appropriate notice, representation, and opt-out rights." *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1503 n.39 (N.D. Ala. 1991), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 509 U.S. 906 (1993).

The proposition that a class action judgment entered without adequate notice nevertheless carries preclusive effect is further undermined by decisions from several federal circuits sustaining collateral attacks on class action judgments based on the inadequacy of the prior class notice. *See, e.g., Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1228 (11th Cir. 1998) ("deficiencies in the notices preclude our allowing the judgment in the prior action to bar Twigg's claims because invocation of the bar would not be consistent with due process"); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (because absent class member was not provided with notice and opt-out rights in prior class action, "*res judicata* will not bar Brown's claims for monetary damages against Ticor" in subsequent suit), *cert. dismissed*, 511 U.S. 117 (1994); *Besinga v. United States*, 923 F.2d 133, 137 (9th Cir. 1991) ("Where the basis for applying res judicata is *FAVDA*'s purported class action status under Rule 23, and where it is clear that the trial court and the parties failed to comply with Rule 23(c)(2)'s mandate that notice be provided to absent class members, it would defy logic

and law to hold that such putative class members are bound by res judicata."); *Wright v. Collins*, 766 F.2d 841, 847-48 (4th Cir. 1985) (class member not precluded from pursuing damages claims encompassed by earlier class action judgment because class notice did not notify class member that subsequent damage claims would be precluded); *Bogard v. Cook*, 586 F.2d 399, 408 (5th Cir. 1978) (prior class action concerning prison conditions did not bar class member from pursuing subsequent suit for damages arising out of the same conditions because class action notice was "insufficient to alert prisoners to the possibility that they could seek individual money damages for personal wrongs"), *cert. denied*, 444 U.S. 883 (1979). In short, the weight of authority establishes that the availability of a collateral challenge to the adequacy of notice is a minimum requirement of due process.

Legal arguments aside, petitioners' factual premise – that the trial and appellate courts have already ruled on the adequacy of notice to "future victims" like Stephenson and Isaacson – is simply wrong. In fact, nothing in either the district court's opinion supporting certification of the Agent Orange class or in the Second Circuit's opinion affirming the certification and order approving the settlement indicates that these courts considered whether the notice was sufficient to apprise *class members without any manifest injury* of "the pendency of the action" or "their rights in it," or whether such claimants had a meaningful and adequate opportunity to remove themselves from the class. On the contrary, the district court's certification opinion – which was issued long before the parties provided in the settlement agreement that the class "includes persons who have not manifested injury" – merely states as a boilerplate conclusion that "[t]he notice provided for in this Order is the best reasonable and practicable notice under the circumstances of this litigation." *In re "Agent Orange" Prod. Liab. Litig.*,

100 F.R.D. 718, 731 (E.D.N.Y. 1983). And, in approving the notice plan, the Second Circuit merely observed that "[a]nyone *who believed that he or she had suffered injury as a result of exposure* to Agent Orange in Vietnam was on notice of the pendency of a lawsuit and was thus alerted to seek advice from counsel." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987) (emphasis added), *cert. denied*, 484 U.S. 1004 (1988). So it cannot be fairly said that the constitutional objections to notice raised by Stephenson and Isaacson below were raised and adjudicated by the district and appellate courts in the Agent Orange class action litigation.[3]

Although the court below did not "definitively decide" whether Stephenson and Isaacson received inadequate notice of the Agent Orange class action, 273 F.3d at 261, this Court may and should consider the issue as an alternative ground for holding that Stephenson and Isaacson are not bound by the judgment in the class action. The Court should therefore examine the notice of the Agent Orange class action issued in 1984 to determine whether application of the bar of res judicata

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[3] In a prior collateral attack on the Agent Orange class action judgment, the Second Circuit did not consider whether the language of the notice adequately alerted persons who had not yet manifested injury of their membership in the class. *Ivy v. Diamond Shamrock Chems. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994). The court did, however, reject the contention made by Stephenson and Isaacson here that, as a general matter, constitutionally adequate notice of a mass tort class action cannot be given to persons without currently manifested injuries. Because Stephenson and Isaacson were not even arguably parties to *Ivy*, the Second Circuit's decision in that case is not binding on this Court as res judicata on the notice issue. Petitioners do not contend otherwise.

to the claims of Stephenson and Isaacson would comport with due process.

II. The Notice Of The Agent Orange Class Action Was Constitutionally Inadequate To Inform Persons Without Any Manifest Physical Injury That Their Hypothetical Future Claims Would Be Adjudicated In The Class Action.

A. In A Class Action That Undertakes To Resolve Claims For Latent Personal Injuries, Notice To "Future Claimants" Without Clinically Detectable, Compensable Injuries Is Inherently Deficient.

In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), this Court considered the constitutional adequacy of notice of a mass tort class action provided to absent class members who, like Stephenson and Isaacson, had no manifest injury at the time of their actual or constructive receipt of the notice. Like the *Agent Orange* class action, the *Amchem* class action purported to resolve future, as well as existing, claims for personal injury against the defendants. The *Amchem* class was defined to include all persons occupationally exposed to asbestos – whether or not they had yet sustained a clinical injury as a result of the exposure – and their families. 521 U.S. at 605. The district court approved a plan for notifying the class by individual notice and publication that this Court described as "elaborate." *Id.* at 606.

Nevertheless, this Court questioned "whether class action notice sufficient under the Constitution and Rule 23 could *ever* be given to legions so unselfconscious and amorphous." *Id.* at 628 (emphasis added). The Court noted that the difficulty of providing adequate notice to future claimants "rendered highly

problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement." *Id.* The Court observed that persons who suffer no clinical injury from a toxic exposure "may not even know of their exposure, or realize the extent of the harm they may incur." *Id.* And, the Court added, "[e]ven if they fully appreciate the significance of the class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Id.* Because the Court rejected the class action settlement for other reasons, the Court did not rule "definitively" that notice to the *Amchem* future claimants was inadequate. *Id.* But the Court's determination to address the issue even though it disposed of the case on other grounds reveals the depth of the Court's skepticism about class actions that purport to resolve the personal injury claims of persons not yet clinically injured.

The Court's discomfort with the notion that an individual could be called upon to take action to preserve a tort claim before he or she has reason to know it exists can be traced to its early embrace of the "discovery rule," which delays the running of the statute of limitations in latent injury cases. In its landmark decision in *Urie v. Thompson*, 337 U.S. 163, 168-71 (1949), the Court rejected the contention that the statute of limitations in a latent injury case governed by the Federal Employers' Liability Act begins to run when the plaintiff sustained exposure to the hazardous substance that ultimately caused the injury. Such a view, the Court reasoned, would lead to the draconian and untenable result that a plaintiff's "failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability." *Id.* at 169. Rather, "the afflicted employee can be held to be 'injured' only when

the accumulated effects of the deleterious substance manifest themselves." *Id.* at 170 (quoting *Associated Indem. Corp. v. Industrial Accident Comm.*, 12 P.2d 1075, 1076 (1932)).

The "discovery rule" applied in *Urie* reflects a nationwide consensus that it is unfair and irrational to adjudicate a personal injury claim before it comes into existence. *See, e.g., Childs v. Haussecker*, 974 S.W.2d 31, 37 & n.2 (Tex. 1998) ("almost every jurisdiction applies some formulation of the discovery rule, either legislatively or judicially, in latent injury and disease cases," citing cases); Susan D. Glimcher, Note, *Statute of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?* 43 U. PITT. L. REV. 501, 517 (1982) ("Most jurisdictions now recognize 'the obvious and flagrant injustice' of barring a cause of action before a plaintiff can become aware of an injury."). The law of Louisiana, where Stephenson developed the cancer upon which this action is based, did not require Stephenson to file his claim until his cancer "manifested itself with sufficient certainty to support accrual of a cause of action." *Cole v. Celotex Corp.*, 620 So.2d 1154, 1156 (La. 1993). Similarly, the law of New Jersey did not require Isaacson to file suit until he "discovered or should have discovered . . . that the physical condition of which he complains was causally related to his exposure" to Agent Orange. *Vispisiano v. Ashland Chem. Co.*, 527 A.2d 66, 72 (N.J. 1987).

By defining the class to include persons with only unknown, "future" injuries, and by purporting to notify those persons that their future claims would be adjudicated, the Agent Orange class action court denied these "future claimants" the benefit of the permissive accrual rules conferred by state law. Put another way, the court effectively accelerated these unripe claims for the sole purpose of binding the claimants to the class

action settlement. How the acceleration of the claims could possibly have benefitted "future claimants" – in light of the "pervasive factual and legal doubt" surrounding the claims at the time and the "nuisance value" of the settlement (*In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 149, 151) – has never been explained by the parties or by any court reviewing the settlement. Moreover, neither petitioners nor their *amici* have ever explained why the defendants in the Agent Orange class action needed, or were entitled to, closure or repose as to these unasserted contingent claims. Although future claimants have a strong interest in notice and a meaningful opportunity to exclude themselves from a class action designed to resolve their future claims, petitioners have shown no countervailing interest – in the absence of inadequate resources to pay all claims – in the need to resolve future claims through a global proceeding. Under such circumstances, the Court should recognize a due process right to opt out of a class action when the injuries become manifest.

In *Shutts*, the Court held that a state court could constitutionally exercise jurisdiction over the claims of an absent class member that had no contact with the forum state because "[a]ny plaintiff may consent to jurisdiction," 472 U.S. at 812, and the Court could reasonably infer consent to jurisdiction from the failure of the class member to execute an opt-out form. *Id.* at 813-14. But, as the Court found in *Urie*, one cannot justifiably infer consent to the jurisdiction of the class action court from an uninjured class member's failure to opt out. To paraphrase *Urie*, in a mass tort class action that includes persons with only latent, undetectable, "future" injuries, the failure of such a person "to diagnose [within the opt-out period] a disease whose symptoms had not yet obtruded upon his consciousness" should not constitute "waiver" of his

due process right to opt out and pursue their tort claims in a proper forum of his or her choice. 337 U.S. at 170.

B. Even If It Were Theoretically Possible To Give Adequate Notice Of A Class Action To Future Personal Injury Claimants, Adequate Notice Was Not Given To Future Claimants In The Agent Orange Class Action.

The Agent Orange class action notice announced the certification of a class consisting of "those persons who were in the United States, New Zealand, or Australian Armed Forces at any time from 1961 to 1972 *who were injured* while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . .." *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1984) (emphasis added). Although petitioners now claim that the class certified by the district court "expressly was understood [sic] to include both ill and asymptomatic veterans," Pet. Br. 4, this "understanding" was not communicated to absent class members prior to expiration of the opt-out period. Instead, it was only *after* notice had been issued, *after* the opt-out period had expired, and *after* the class plaintiffs and defendants had agreed to a global settlement, that the parties "made express" in the written settlement agreement their "understanding" that the class included persons who had not yet manifested injury. Pet. Br. 7; *see In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 864-65 (E.D.N.Y. 1984). The court then ordered the parties to issue notice to the class of the proposed settlement. *Id.* at 866-67. The first sentence of the notice of settlement advised class members of the settlement and "OF WHAT YOU MUST DO NOW *IF YOU BELIEVE YOU HAVE A CLAIM FOR ADVERSE HEALTH EFFECTS* ALLEGEDLY RELATED TO AGENT ORANGE EXPOSURE IN OR NEAR VIETNAM." *Id.* at 867 (capital

letters in original; emphasis added). The second sentence of the notice of settlement quoted the class definition, indicating that persons "who were injured" by exposure to Agent Orange were included in the class. *Id.* Only after reciting the financial terms of the settlement did the notice of settlement state, "The Settlement Agreement confirms that the class includes persons who have not yet manifested injury." *Id.* at 868. Because the parties published this notice to the class after the expiration of the opt-out period, the hypothetical class member who read the entire notice of settlement and thereby learned for the first time of his or her inclusion in the class had no opportunity to opt out of the class.[4]

In affirming the Agent Orange class action settlement on direct appeal, the Second Circuit found the notice sufficient to alert those persons "who believed that he or she had *suffered injury* as a result of exposure to Agent Orange in Vietnam" of the pendency of a lawsuit potentially affecting their rights. *In re "Agent Orange Product Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987) (emphasis added), *cert. denied*, 487 U.S. 1234 (1988). No reasonable person reading the notice, however, could possibly have understood that the class included persons who had not developed a clinically detectable injury. On the contrary, rather than include all persons exposed to Agent Orange, the class notice merely included those "who were

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[4] Even if the notice of settlement made it sufficiently clear that persons merely exposed to Agent Orange were members of the class, which it did not, "a Rule 23(e) notice of partial settlement is not intended to serve as a Rule 23(c)(2) notice of pendency of the suit. The Rule 23(c)(2) notice of pendency . . . with its options for opting out, is the basis on which [the defendant] can subsequently raise its claims of preclusion." *In re Viatron Computer Systems Corp. Litig.*, 614 F.2d 11, 14 (1st Cir. 1980), *cert denied*, 449 U.S. 826 (1980).

injured . . . by exposure." Moreover, neither a layperson nor a seasoned toxic tort lawyer would equate "exposure" to a toxic substance with "injury." Mere exposure to a toxic substance itself generally confers no legal rights or obligations on the person exposed. It ordinarily does not support a claim for damages. *See, e.g.*, *Metro-North Commuter R. v. Buckley*, 521 U.S. 424, 432 (1997) (noting that "with only a few exceptions, common-law courts have denied recovery to those who, like Buckley, are disease and symptom free"). And exposure alone does not trigger the statute of limitations on a claim for personal injuries based on the toxic exposure; it certainly did not in Louisiana and New Jersey, where Stephenson and Isaacson resided, respectively. *See* Part II(A) *supra* at 16.

It may or may not be true, as class counsel maintained in defending the expansive interpretation of the class definition in the district court, that mere exposure to a toxic substance may constitute an injury "in the technical law of torts" applied by New York courts. *Ivy*, 996 F.2d at 1433-34 (quoting class counsel).[5] But to bind absent class members, notice cannot be

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[5] *But see Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.) ("subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law"), *cert. denied*, 474 U.S. 864 (1985); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 635-38 (3d Cir. 1996) (Wellford, J., concurring) (arguing that plaintiffs exposed to asbestos but who have not developed clinical injury have no "injury-in-fact" and thus no standing to sue), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); Jeremy Gaston, Note, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 TEX. L. REV. 215 (1998) (same).

"technical;" rather, it must be delivered in a manner "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *see also In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1977) (class notice must deliver "an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member"); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (class settlement did not bar class member from asserting individual claim because notice was "insufficient to notify him that claims like his were being litigated in the action"). The language of the notice in the Agent Orange class action simply did not convey to the average class member that claims for unknown injury could be decided or compromised in the case. The very fact that the class settlement proponents found it necessary to make "express" in the settlement agreement the inclusion of persons with undeveloped injuries in the class demonstrates that the class notice did not adequately inform such persons of their class membership.

By comparison, the notice given to the class of present and future claimants in *Amchem* was far more precise and accurate. The class definition included persons "who have been exposed . . . either occupationally or through the occupational exposure to a household member to asbestos . . .." 521 U.S. at 602 n.5. The district court found the class "somewhat unusual" because it included as members "persons who have not yet been diagnosed with an asbestos-related injury." *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 333 (E.D. Pa. 1993). Believing it "extremely important that these persons be alerted to their potential membership in the class," the court ordered that "clarifying language be added or made more prominent in

some of the notice materials." *Id.* Even with these clarifications, this Supreme Court questioned the efficacy of the notice to future claimants. 521 U.S. at 628.

"When notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315. In the Agent Orange class action, the notice did not apprise persons exposed to Agent Orange but who had not yet sustained detectable injuries that they were members of the class and that their future claims would be decided in the action unless they opted out. Notice to such persons was nothing more than "a feint" in their direction. *Id.* Because Stephenson and Isaacson did not receive adequate notice of the potential disposition of their claims in the class action, the Due Process Clause does not permit the judgment in that action to serve as res judicata of the claims asserted in this case.

III. A Decision Allowing Respondents To Pursue Their Personal Injury Claims Would Not Be Unfair To Petitioners, Nor Would It Impair Proper Use Of Class Actions.

Petitioners complain that the Second Circuit's refusal to bar the claims of Stephenson and Isaacson is unfair to them, arguing that they entered into the Agent Orange settlement "in good faith," fully performed under the terms of the settlement, and should be entitled "to rely on the finality of an apparently definitive judgment." Pet. Br. 38. But if the defendants that participated in the Agent Orange settlement truly did rely on the judgment in that action to protect them from the assertion of claims in the future that did not exist at the time of the settlement – a doubtful proposition, in light of the $10 million reserved in the settlement to indemnify defendants for

judgments entered in state court[6] – their reliance was unjustifiably optimistic. Even conventional class action judgments are vulnerable to collateral attack: "[e]ver since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme." *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). But this judgment had to have been perceived as more vulnerable because of its novelty. It is beyond legitimate dispute that the judgment below was the product of "a new variety of class action" which contained "a novel combination of features," including the inclusion as class members of "future victims, many of whom have yet to suffer a cognizable injury." Sylvia A. Law, *Tort Liability and the Availability of Contraceptive Drugs and Devices*, 23 N.Y.U. REV. L. & SOC. CHANGE 339, 357 (1997). "A class action settlement with these features would have been unthinkable to lawyers of a decade or so ago." *Id.* at 358. The observation by one of petitioners' *amici* that the Agent Orange class action participants "partly wrote the book" on mass tort class actions (Brief of *Amicus Curiae* Defense Research Institute ("DRI Br.") at 26 n.29) only underscores the novelty, and vulnerability, of the closure and repose petitioners attempted to gain through the class action settlement.[7]

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[6] *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 864 (E.D.N.Y. 1984).

[7] Moreover, the fact that the defendants did not craft the distribution scheme (Pet. Br. 45), under which Stephenson and Isaacson collected no compensation, does not protect them from the consequences of participating in a class action settlement that denies some absent class members due process. As this "Court explain[ed] in *Shutts*, it is partly up to the defendant to safeguard the interest of

Petitioners also complain that affirmance of the Second Circuit's decision will have more widespread "pernicious consequences." Pet. Br. 39. Defendants in class actions, petitioners assert, "would face the prospect of resolving the case and paying out on the judgment, only to confront never-ending litigation brought by innumerable class members many years later." Pet. Br. 39-40. Petitioners' *amici* amplify this concern, arguing hyperbolically that the Second Circuit's ruling "shakes the foundations of every class action decision in this country," DRI Br. 4, confers "a limitless power to collaterally attack a class action settlement by previously bound class members who are willing to do so," *id.*, and "would, in effect, place a question mark after every 'It is so ordered' entered on the Nation's class action docket." Brief of the Product Liability Advisory Council as *Amicus Curiae* in Support of Petitioners at 2.

The concerns of petitioners and their *amici* are wildly overstated and ultimately unfounded. As a practical matter, the typical class action settlement is not vulnerable to collateral attack "many years later" because class members will be barred by the statute of limitations from asserting their claims individually. The Second Circuit's decision in this case leaves vulnerable to collateral attack only those class settlements that purport to resolve the claims of class members who have no current injury or reason to be in court, and who are included in the class only to give the defendants who have committed a

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the absent plaintiffs. If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented." *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 770 (3d Cir.) (citation omitted), *cert. denied*, 493 U.S. 821 (1989).

mass tort the maximum possible "peace" (DRI Br. 30) – peace to which, under the "discovery rule" followed in virtually all jurisdictions, they are not entitled.

Unlike the typical class action settlement, which seeks to bind only persons with at least some currently viable claim, the Agent Orange settlement sought to bind persons that had no currently actionable claim for personal injury. In contrast, six of the nine class action settlements identified by *amicus curiae* DRI as threatened by the Second Circuit's ruling (DRI Br. 28-29) do not involve claims for personal injuries at all, but instead involve *existing, currently viable* claims for financial harm (*Cendent Securities Litigation, Airline Ticket Price Fixing, Lucent Technologies Phone Leasing Litigation*), property damage (*Chrysler Minivan Litigation)*, or discrimination (*EEOC v. Western Electric, Haynes v. Shoney's Inc.*). DRI cites three class action settlements of personal injury claims. One did not involve latent harm. *See In re Copley Pharm., Inc.*, 158 F.R.D. 485, 490 (D. Wyo. 1994) ("This is not a case with delayed injuries or future risk."). The other two settlements (*Bjork-Shiley Convexco-Concave Heart Valve Litigation* and *Pondimin and Redux Litigation*) gave a "back-end opt-out" to class members who did not request exclusion during the initial opt-out period but who developed serious physical harm later. *In re Diet Drugs Prods. Liab. Litig.*, 2000 WL 1222042, *39 (E.D. Pa. Aug. 28, 2000), *aff'd*, 275 F.3d 34 (3d Cir. 2001); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 170 (S.D. Ohio 1992). Although the details of these settlements may nonetheless make them vulnerable to collateral attack, it is apparent that the DRI's report of the demise of the class action as a result of the Second Circuit's decision is greatly exaggerated.

Affirmance of the Second Circuit's decision will not inhibit settlement of properly certified, properly limited class actions.

But the decision will prevent mass tort defendants from seeking to extinguish future liability by roping into a class action settlement persons without any current injuries who cannot be effectively notified of the need to take action to preserve their future claims. That, contrary to the assertions of petitioners and their *amici*, is good public policy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON, EMILY ELIZABETH STEPHENSON, JOE ISAACSON, and PHYLLIS LISA ISAACSON,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE LYMPHOMA FOUNDATION OF AMERICA, CARL F. CRANOR, DEVRA DAVIS, PETER L. DEFUR, BRIAN G. DURIE, ALAN H. LOCKWOOD, DAVID OZONOFF, ARNOLD J. SCHECTER, AND DAVID WALLINGA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

Amici, Carl F. Cranor, Devra Davis, Peter L. deFur, Brian G. Durie, Alan H. Lockwood, David Ozonoff, David Wallinga, and the Lymphoma Foundation of America, are physicians, scientists, scholars of science, and a public health organization.[2]

Amici are familiar with the methods and techniques by which physicians, scientists, and public health specialists assess adverse health outcomes from exposure to toxic substances, and Amici are engaged in the practice of fields of medical science in which such assessments are routinely required. As such, amici are familiar with the process and methods by which the scientific and medical community and governmental agencies make determinations regarding causal associations between exposure to particular substances and adverse health effects. None of the amici has any financial or other similar interest in the outcome of this lawsuit or any suits raising similar issues.

Amici appear in their own behalf to alert the Court to the substantial developments in medical knowledge and understanding of Agent Orange related disease since 1984 when the class action settlement at issue was entered. Amici are concerned that Petitioner chemical companies have used

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1. This brief was not authored, in whole or in part, by counsel for any party. Other than the amici on whose behalf this brief is submitted, and their counsel, no person or entity made any monetary or other contribution to the preparation of this brief. The parties have consented to the filing of this brief.

2. The qualifications and positions held by amici are set forth in the appendix bound with this brief.

selected citations from the decisions below to lead the Court to believe that the epidemiologic and other scientific data is too undeveloped for medical science to assess causality for Agent Orange and particular diseases, especially non-Hodgkin's lymphoma and multiple myeloma. Equally importantly, Amici are deeply concerned that the chemical companies have given a false impression that all cases alleging an association between dioxin containing phenoxy herbicides and cancer are inherently "weak," because of a lack of credible causation evidence. [Petitioners' Brief at pp. 3, 10]

Amici take strong exception to these characterizations of the status of scientific assessment of the causal association between herbicides and cancer. As Amici will show, as a result of an overwhelming medical and scientific effort over the past 15 years or so, Agent Orange disease research is informed by an abundance of cohort,[3] case control,[4] and environmental epidemiologic studies,[5] and most particularly government funded review of these studies performed by the National Academy of Science, Institute of Medicine. Amici believe it is accurate to say that these reports powerfully demonstrate that the scientific community views the association between

3. The cohort studies include studies of production workers, agricultural and forestry workers, herbicide applicators, paper and pulp workers, and Vietnam Veterans.

4. The case control studies consider people who have died from or have been diagnosed with specific diseases (often cancer) and evaluate their histories to determine whether they had greater herbicide exposure than persons without the diseases.

5. The environmental studies assess disease in people exposed to herbicides in accidents or from farming.

herbicide exposure and several adverse health effects as being causal, and that the causal association for non-Hodgkin's lymphoma and multiple myeloma from herbicide exposure is much stronger than was perceived in 1984 based upon the limited data available at that time. Indeed, there is a high degree of scientific consensus that phenoxy herbicide expsures are causally associated with development of certain cancers such as Non-Hodgkin's Lymphoma, Hodgkin's disease, soft tissue sarcoma, and multiple myeloma. Welch Affidavit JA 298.

In sum, this brief will show that had a representative of veterans who had not yet manifested disease been properly appointed at the time of the proposed settlement, there was enough indication in the medical literature then to compel that representative to conclude that it was plausible that medical knowledge would continue to develop so that when future claims accrued there would be substantial medical proof to support them. Such a representative would then have been compelled to fight vigorously to preserve such claims so that they could be brought as diseases developed in the future and injury claims accrued under state law.

STATEMENT OF FACTS

Respondents Dan Stephenson and Joe Isaacson are Vietnam Veterans who were exposed to phenoxy herbicides in Agent Orange. After their service both veterans returned to private life and lived normal healthy lives, without evidence of any disease associated with Agent Orange. Tragically, both developed cancers associated with Agent Orange exposures after the Agent Orange settlement and after all settlement funds had been disbursed.

Agent Orange is an herbicidal chemical mixture that was used to defoliate jungle terrain and clear vegetation around enemy military installations in the Vietnam War. The name derives from the orange-identifying strip on drums in which the herbicide was stored. Agent Orange is a 1:1 mixture of the n-butyl esters of 2,4-dichlorophenoxyacetic acid (2,4-D) and 2,4,5-trichlorophenoxyacetic acid (2,4,5-T). A byproduct contaminant of the manufacturing process for 2,4,5-T is 2,3,7,8-tetrachlorodibenzo-para-dioxin (TCDD), commonly referred to as dioxin.

Agent Orange was one of 15 herbicides sprayed in Vietnam although, due to its intensified usage, it is the herbicide most commonly associated with health problems of Vietnam Veterans. Some of the other herbicides used during the Vietnam War were Agent Purple (a mixture of 2,4,-D and 2,4,5,-T used between 1962 and 1964), Agent Green and Agent Pink, (each of which contained 2,4,5-T and was used between 1962 and 1964), Agent White (a 4:1 formulation of 2,4-D and Picloram), Agent Blue (which contained cacodylic acid), and Agent Orange II (a mixture of 2,4,-D and 2,4,5-T which was used in 1968 and 1969 and sometimes called "Super Orange").

SUMMARY OF ARGUMENT

Petitioner chemical companies have attempted to characterize the medical evidence of a causal relationship between the cancers now suffered by the Respondent veterans and their exposure to Agent Orange in Viet Nam as very weak when the case was settled in 1984 and have implied that medical knowledge more than 15 years later is no better in establishing such a relationship. Both characterizations are wrong.

We wish to focus the Court's attention on the evidence of a causal association between certain cancers and phenoxy herbicides that had already developed by the time of the settlement, even though latency periods for development of such cancers from agricultural and war time exposure were just being reached. As such, it would have been critically important that someone represent veterans who did not at that time have any cancer or other claim of injury from Agent Orange exposure. With knowledge of the developing body of medical evidence linking herbicide exposures and certain cancers, a competent representative of future disease claimants would have recognized that as the state of medical knowledge of Agent Orange induced disease progressed, Veterans later developing such diseases would be able to prove causation of their diseases by herbicide exposure at the time their diseases manifested and were diagnosed. As such, any adequate representative of future disease claimants, who was independent and without conflicts, would have vigorously fought to preserve those future claims and would not have accepted nuisance or de minimis settlements for future claims before they even accrued.

Moreover, in the past 15 years, despite the false implications by the chemical companies to the contrary, medical evidence of causality of herbicide induced lymphopoietic malignancies has become so robust that there is now a consensus among knowledgeable scientists and public health specialists a causal association exists between non-Hodgkin's lymphomas (including multiple myeloma) and exposure to Agent Orange and its contaminant dioxin. The cases presently before the court are thus by no means weak and these veterans will never obtain redress for their injuries unless they are allowed to persuade the Court that they have been deprived of Due Process and should be allowed to have their day in court.

ARGUMENT

I. Although There Was Not Then a Scientific Consensus That the Herbicides in Agent Orange Caused Cancer, by 1984 There Was Enough Medical Evidence Pointing to the Plausibility of Such a Relationship That Anyone Adequately Representing Veterans Who Had Not Yet Developed Cancer Would Have Vigorously Fought to Preserve Their Right to Bring Claims in the Future When Diseases Later Developed.

The development and use of phenoxyacetic acids as herbicides began towards the end of World War II. Widespread use in agriculture began in the early 1950s, so the first occupational exposures would have occurred during this time. Because cancers, especially lymphopoietic malignancies such as lymphomas and myelomas, have lengthy latency periods, such malignancies resulting from herbicide exposure would not be expected to occur for decades or more. As such, until at least three decades passed following first widespread use, without knowing what the companies themselves knew about worker illness or disease from exposures,[6] outside scientists and medical researchers would not likely have sufficient case reports and other data gathered to form any clear opinions about the relationship between human exposure to these herbicides and cancers such as non-Hodgkin's lymphoma and multiple myeloma.

6. While amici have not personally reviewed the documentary records produced in other herbicide litigation, they are aware that there is substantial documentation of inter-company studies and concerns raised about the toxicity of these products, and particularly about their contamination with dioxin.

An estimated 19 million gallons of Agent Orange were mixed, loaded, and sprayed in South Vietnam. With the widespread international use of these powerful chemicals in agriculture and the massive use of these potent chemicals during the Vietnam War, beginning in the early 1970s the medical and scientific community began directing its attention to determining whether adverse health effects were associated with these chemicals. The first independent studies investigated the epidemiology of herbicide sprayers and manufacturing workers. Welch Affidavit JA 295.

The first reported evidence of this linkage came from Sweden with clinical reports in the late 1970s by a group of Scandinavian physicians. *See, e.g.*, Hardell, L., "Malignant Lymphoma of Histiocytic Type and Exposure to Phenoxyacetic Acids or Chlorophenols," *Lancet* Jan. 6, 1979 at pp. 55-56; Olsson, H., "Non-Hodgkin's Lymphoma of the Skin and Occupational Exposure to Herbicides, *Lancet*, Sept. 12, 1981 at pp. 579-580. These were followed with epidemiological studies by the same group. *See* Hardell, L., "Malignant Lymphoma and Exposure to Chemicals, Especially Organic Solvents, Chlorophenols and Phenoxy Acids: A Case-Control Study," *British J. Cancer* 43:169-176 (1981); Hardell, L., "Relation of Soft-Tissue Sarcoma, Malignant Lymphoma and Colon Cancer to Phenoxy Acids, Chlorophenols, and Other Agents," *Scand. J. Work Environ. Health* 7:119-130 (1981).

At the same it was becoming accepted even among chemical company funded researchers that these phenoxy herbicides were contaminated with dioxin, a potent carcinogen. *E.g.*, Kociba, R.J., et al., "Results of a two-year chronic toxicity and oncogenicity study of 2,3,7,8-tetrachlorodibenzen-p-dioxin in rats." *Toxicol. Applied Pharmacol.* 469:179-303 (1978).[7]

7. The lead author and other authors on this study were Petitioner Dow employees and the work was funded by Petitioner Dow.

By 1984 there were thus a number of studies and reports which suggested there was a linkage between herbicide exposure and cancer. In particular there were a number of articles linking Respondent Isaacson's disease, non-Hodgkin's lymphoma, to phenoxy herbicide exposure. *E.g.*, Cantor, K.P, "Farming and Mortality from Non-Hodgkin's Lymphoma: A Case-control Study," *Int. J. Cancer* 29:239-247 (1982); Bishop, C.M., et al., "Non-Hodgkin Lymphoma of the Scalp in Workers Exposed to Dioxins," Lancet 2:369 (1981); Hardell, L., et al., "Malignant Lymphoma and Exposure to Chemicals, Especially Organic Solvents, Chlorophenols and Phenoxy Acids: A Case Control Study," *Br. J. Cancer* 43:169-176 (1981); Hardell, L., "Relation of Soft-Tissue Sarcoma, Malignant Lymphoma and Colon Cancer to Phenoxyacides, Chlorophenols and Other Agents," *Scand. J. Work Environ. Health* 7:119-130 (1981); Olsson, H., et al, "Non-Hodgkin's Lymphoma of the Skin and Occupational Exposure to Herbicides," *Lancet*, Sep. 12, 1981 at p. 579.

While these studies were suggestive of a causal link, they were inadequate to allow the broader scientific community to reach a consensus regarding the human carcinogenicity of the phenoxy herbicides used in Viet Nam. Welch Aff., JA 297. This was likely due to the lack of data as latency periods for cancers from agricultural exposure were just being approached. Because of the latency period between exposure to a hazardous substance and the onset of cancer, it can take decades before health effects occur, especially for lymphoid malignancies, and even longer before they are observable in studied populations. Welch Aff. JA 299.

Thus, there were enough problems with these early studies regarding sample size and exposure assessment and

classification, that while some scientists were prepared to form conclusions about the causal linkage between these chemicals and certain cancers, the scientific and medical community at large was not yet ready to embrace that conclusion.[8] *See, e.g.*, Welch Aff. JA 297.

Nevertheless, what is critical for the Court's consideration is that by 1984 there was a substantial peer reviewed body of mainstream journal articles indicating that a statistical linkage had been found between exposures to phenoxy herbicides and certain cancers. By 1984 it was also well known that the latency for carcinogenesis is often in excess of thirty years, as shown by studies finding linkages between asbestos exposure and mesothelioma, tobacco and lung cancer, and alkylating agent therapy and non-Hodgkin's lymphoma. Judge Weinstein himself recognized this when he referred to the forty years that it had taken for nuclear bomb exposures to manifest in cancers.[9] 597 F. Supp. at 795.

The bottom line is this: Given the growing number of mainstream journal articles indicating a linkage between

8. It should be noted that even by 1984 at the time the case was set for trial there were a number of very qualified scientists who were prepared to testify about the adverse health effects caused by exposure to herbicide combination in Agent Orange. JA ****.

9. The district court recognized that it was "of course, possible that in a few years a sudden increase in diseases associated with Agent Orange will be revealed." 597 F. Supp. at 795, noting that "[i]t took almost forty years for solid tissue cancers to develop in victims of atomic bombing in Japan." 597 F. Supp. at 795. Indeed, the earliest exposed veterans were only 22 years post exposure at the time of the settlement, while the most recently exposed veterans were only 13 years post-exposure. Cancer latency for environmental toxins is often well in excess of twenty years. 597 F. Supp. 783.

herbicides and cancer, and given the well known problem of long latencies for gathering enough data to form strong statistical conclusions, it was plainly incumbent on any representative or lawyer representing veterans in 1984 who had not yet developed any disease to vigorously seek to preserve future claims, to remove any potential future claimant from the settlement, or provide a basis for opting out after a disease had become manifest and the claim had accrued. Delay in litigation of a claim until a disease had actually developed would potentially allow further developments in the medicine and science to elucidate the causal linkage that was suggested at the time. Thus, Respondents' claims would likely have been preserved had a competent representative of future disease claimants been appointed, who preserved the rights of future disease claimants to litigate their Agent Orange related disease claims after they manifested. Petitioners cannot explain why future disease claimants would want to settle their unripe claims for nuisance value at best, or for nothing as in the case of Respondents, when they, unlike those already injured, could readily wait for the studies being conducted to be completed. Under the laws of the 50 states, Respondents could not have filed suit until their injuries had manifested and thus accrued under state law, and Respondents would have been protected from the running of statutes of limitations under state laws by the discovery rule. Daller, M.F., *Tort Law Desk Reference: A Fifty-State Compendium* (Aspen 2001). Indeed, some courts have invalidated statutes of repose on due process grounds where such statutes extinguished personal injury claims before manifestation of injury occurred.

II. With the Development of a Large Body of Literature during the past 20 Years as Latencies for Related Diseases Have Now Been Approached, A general Consensus now exists that Phenoxy Herbicide Exposure Is Linked to Certain Cancers, Particularly Lymphomas, including Non-Hodgkin's lymphomas, hodgkin's Lymphomas, and Multiple Myeloma.

Although Hardell and others in Scandinavia published other herbicide research before the settlement was negotiated and approved, the first notable study in the United States was a 1986 report by Dr. Sheila Hoar of the National Cancer Institute of a well designed study of farmers in Kansas which found a six-fold increased risk of NHL in farmers having exposure to herbicides which was statistically significant. Dr. Hoar also found a statistically significant dose response relationship between the number of days sprayed and the elevated risk. The risk of NHL increased to 8-fold for those who reported exposures for more than 20 days per year. Hoar, S.K., "Agricultural Herbicide Use and Risk of Lymphoma and Soft-Tissue Sarcoma," *J. Amer. Med. Assoc.* 256:1141-47.

In the next few years, the body of knowledge increased greatly. An independent review article by Morrison and others in the Journal of the National Cancer Institute, analyzing every study then published on the subject, clearly established this point. Morrison, H.I., et al., "Review: Herbicides and Cancer," *J. Nat'l Cancer Inst.* 84:1866-1874 (1992).

> The most convincing evidence suggesting that herbicides may be human carcinogens arises from studies of non-Hodgkin's lymphoma. An increased

> risk of NHL among farmers has been reported from the United States, Australia, and New Zealand.

Id. at 1866. In this review Morrison explained why the few studies which had not shown a positive linkage were not as persuasive as those that did. Morrison and his co-authors concluded:

> There is reasonable evidence to suggest that phenoxy herbicide exposure results in an increased risk of developing NHL. Most studies have revealed an elevated risk, and those that have examined dose-response relationships have usually noted statistically significant trends.

A. The Congressional Mandate to Research Agent Orange Disease and the Institute of Medicine

In response to the concerns voiced by Vietnam Veterans and their families, the scientific community, and herbicide manufacturers, Congress recognized a need for an objective scientific appraisal of the association between the increased risk of disease and exposure to Agent Orange and the other herbicides used in support of military operations in Vietnam. In 1991 Congress passed the Agent Orange Act of 1991, Pub. L. No. 102-4, § 3, 105 Stat. 11, 13-15 (codified as amended at 38 U.S.C. § 1116 (1991). Congress required the Secretary of Veterans Affairs to agree to a review of the issue by the National Academy of Sciences. Created by an Act of Congress, the National Academy of Sciences ("NAS") is a non-governmental, non-profit society of distinguished scholars with a mandate to advise the federal government on pressing scientific and technical issues. Its members are

elected by their peers from universities and the private sector, and the members serve without compensation. The National Academy of Sciences was charged with evaluating the strength of the scientific evidence as to an association between human exposure to the herbicides and suspect diseases. The NAS created a scientific review process that called for the Institute of Medicine and outside expert panelists to review the large body of scientific literature then available in order to assess the state of scientific knowledge concerning the causal relationship between the herbicide phenoxy acids used as defoliants in Viet Nam and adverse health effects, including cancer. For its Agent Orange committee, the NAS gathered a group of eminent professionals, all of whom had no conflicts of interest, and who had taken no public positions on the potential health effects of herbicides.[10]

In preparation for its report, the NAS committee conducted an exhaustive review of the available evidence — reading 6,420 abstracts, performing detailed review and analysis of 230 epidemiological studies, holding three formal public hearings, and consulting with outside experts. *See* NAS Report at xi-xiii, 735-56. In assessing the relative validity of studies, the NAS critiqued the methods of its peers and based its conclusion that there was a "positive association" between herbicide exposure and five specific diseases only on studies that eliminated chance, bias, and confounding with reasonable confidence. *Cf. Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2795-99 (1993) (proposing similar criteria). In this process, the committee considered several factors for each possible association including

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10. *See* Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides; Division of Health Promotion and Disease Prevention, Institute of Medicine, National Academy of Sciences, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (National Academy Press, Washington, D.C. 1994) at pp. vii, 764-770. (hereafter "NAS Report")

its statistical strength, dose-response relation, temporal relation between exposure and onset, consistency across studies, specificity, and biologic plausibility.[11] *See* NAS Report at 238-40.

B. Conclusions of the Institute of Medicine of the National Academy Of Sciences

Based on this extensive review, the NAS committee concluded that "sufficient evidence" exists to find a "positive association" between exposure to Agent Orange and the onset of three cancers: soft tissue sarcoma,[12] non-Hodgkin's lymphoma,[13] and Hodgkin's disease.[14] *See* NAS Report at

11. Animal studies demonstrate the plausible biological mechanism of dioxin's actions. These studies establish that dioxin

> interacts with an intracellular protein called the Ah receptor [and that] this interaction appears to play a role in a number of health effects observed in animals. Because humans also have intracellular proteins identified as Ah receptors, [the] interactions [of dioxin] and [the Ah] receptors could play a role in human health effects.

NAS Report at 3.

12. Soft tissue sarcomas are a diverse group of malignant neoplasms (tumors) in the areas within and between organs. *See* NAS Report at 782.

13. Non-Hodgkin's lymphomas are a diverse group of malignant lymphomas, i.e., tumors derived from cells in the lymph nodes, but without the giant Reed-Sternberg cells which are characteristic of Hodgkin's disease. *See* NAS Report at 781.

14. Hodgkin's disease is a malignant lymphoma characterized by progressive enlargement of the lymph nodes, liver, and spleen, and by progressive anemia, which is distinguished morphologically from non-Hodgkin's lymphomas by the presence of giant cells known as "Reed-Sternberg" cells. *See* NAS Report at 780.

6-10, 475-501, 525-64, 572-74. Additionally, the NAS Agent Orange committee found evidence "suggestive"[15] of an association between the herbicides used in Vietnam and multiple myeloma.[16] *See* NAS Report at 6-10, 460-75, 512-22, 574-76.

C. The Department of Veterans Affairs' Review of the National Academy of Sciences Report

The Department of Veterans Affairs (VA), which had resisted acknowledging the dangers of Agent Orange, reviewed the NAS Report and "all other sound medical and scientific information." 38 U.S.C. § 1116(b)(2) (1991). The VA concluded that the credible evidence in favor of an association between herbicide exposure and disease is at least as strong as the credible evidence against such an association as to **und** "sufficient evidence," including NHL and four of the five diseases for which the NAS has found "suggestive evidence," including multiple myeloma. In making this determination, the Secretary of Veterans Affairs was required to consider whether the results were "statistically significant, . . . capable of replication, and [could] withstand peer review." 38 U.S.C. § 1116(b)(2) (1991).

In 1991, the VA thus concluded that a positive association exists between exposure to Agent Orange and the subsequent

15. For this category of cancers, the committee could not confidently eliminate possible chance, bias, or confounding. *See* NAS Report at pp. 6, 674-75.

16. Multiple myeloma is a cancer of specific bone marrow cells (plasma cells) characterized by tumors in the marrow of various bones; more specifically, a malignant proliferation of plasma cells derived from B lymphocytes. *See* NAS Report at 781.

development of non-Hodgkin's lymphoma and Hodgkin's disease, as well as multiple myeloma. *See* 59 Fed. Reg. 5,161-62 (1994) (proposed rule) (codified at 38 C.F.R. § 3.309 (1994)). The NAS Report thus altered the "one principle firmly embedded in [the VA's] bureaucratic mind" that "any problems suffered by veterans exposed to Agent Orange . . . were not, with the exception of chloracne, caused by the herbicide." Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts 24 (1986).

D. The Carcinogenicity of Dioxin

It is now established that dioxin, an admitted contaminant of the herbicides combined in Agent Orange, is a very potent poison which can cause a wide range of organ and metabolic dysfunctions. In laboratory animals dioxin has shown to be carcinogenic (causing cancer), teratogenic (causing birth defects) and mutagenic (causing genetic damage).

Dioxin is thought to be a substantial factor in the carcinogenic effect of the phenoxy herbicides it contaminates, including Agent Orange. For many years scientists questioned whether dioxin was carcinogenic to humans. However, an abundance of epidemiologic data now exists which establishes a carcinogenic effect of dioxin in humans. Most governmental agencies and scientists now accept the human carcinogenicity of dioxin.

According to the U.S. Dept. of Health and Human Services, the Public Health Service and the National Toxicology Program, dioxin "is known to be a human carcinogen based on sufficient evidence of carcinogenicity from studies in humans, involving a combination of epidemiological and mechanistic information which indicate

a causal relationship between exposure to TCDD and human cancer." US DHHS, *Tenth Annual Report on Carcinogens* (2002).

Likewise, the International Agency for Research on Cancer of the World Health Organization has concluded that dioxin "is carcinogenic to humans." WHO and IARC, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans: Polychlorinated Dibenzo-para-Dioxins and Polychlorinated Dibenzofurans* (1997) at p. 343. In making this evaluation, the IARC Working Group took into consideration the following supporting evidence: (1) 2,3,7,8-TCDD is a multi-site carcinogen in experimental animals that has been shown by several lines of evidence to act through a mechanism involving the Ah receptor; (2) this receptor is highly conserved in an evolutionary sense and functions the same way in humans as in experimental animals; and (3) tissue concentrations are similar both in heavily exposed human populations in which an increased overall cancer risk was observed and in rats exposed to carcinogenic dosage regimens in bioassays." *Id.*

III. The Cancers at Issue Here are Cancers of the Lymphopoietic System and Thus it Biologically Plausible that Herbicides Would Be Likely to Produce Cellular Injury in Each Type of Lymphoid Cell.

The Institute of Medicine of the National Academy of Sciences found that the evidence is sufficient to conclude that there is a positive causal association between exposure to "herbicides" and non-Hodgkin's lymphoma and Hodgkin's disease and that limited and suggestive evidence of an association for Multiple Myeloma exists — evidence which

Secretary Brown found the data adequate to conclude that a positive causal association exists. Since multiple myeloma is a lymphoid malignancy like non-Hodgkin's lymphoma and Hodgkin's disease, this section will discuss these three conditions together.

Human blood derives from two primary lineages: myeloid cells and lymphoid cells. Various classification systems have been devised for categorizing the different human blood cells and malignancies developing in them. When malignancies were observed in extramedullary sites (e.g., lymphatic tissue such as the thymus), they were often called lymphomas. Two major types of lymphomas were recognized: Hodgkin's lymphoma and non-Hodgkin's lymphoma. Hodgkin's lymphoma (also known as Hodgkin's disease) is a common type of lymphoma that was first described by Thomas Hodgkin in 1832 and is characterized by pathognomic giant cells which were first identified by Reed and Sternberg (so-called "Reed-Sternberg" cells). All other malignancies manifesting in lymphatic tissue were, by default, classified as non-Hodgkin's lymphomas. A subtype of non-Hodgkin's lymphoma was recognized for those malignancies manifesting at extramedullary sites in plasma cells — the disease commonly called multiple myeloma.

With advances in molecular biology, histochemistry, immunophenotypic analysis, and cytogenetics, hematologists and oncologists came to appreciate that classifying the various hematolymphopoietic malignancies by site of manifestation was inappropriate, because malignancies that were morphologically, histochemically, immunologically and cytogenetically identical were assigned different nomenclature simply because they happened to be observed

at different sites within the hematolymphopoietic system (e.g., small B-cell lymphoma = chronic lymphocytic leukemia).

A major advance in understanding lymphoid malignancies was the recognition of three major lymphoid cell lines: B cells, T and NK cells, and the Reed-Sternberg cell. These lymphoid cell lineages are all related and thought to derive from differentiation of a common pluripotent stem cell. The diseases commonly referred to as non-Hodgkin's lymphomas are now classified as various malignancies based upon their cell of origin, a host of morphologic, histochemical, immunologic, immunophenotypic and cytogenetic characteristics, and the degree of maturity of the malignant clone.

The most recent classification of these diseases is that of the World Health Organization published by the International Agency for Research on Cancer in 2001.[17] According to this classification system, lymphomas are now classified as B-Cell Neoplasms, T-Cell and NK-Cell Neoplasms, and Hodgkin Lymphomas. Most of the diseases previously categorized as non-Hodgkin's lymphomas are now classified as "Mature B-cell Neoplasms," a category of 17 identified diseases which includes Plasma Cell Myeloma — the new nomenclature for multiple myeloma.

In sum, these diseases are all malignancies of lymphoid lineage, are thought to be derived from a common stem cell, are biologically similar, develop from cellular damage, have

17. The WHO Classification System is based on the principles defined in the "Revised European-American Classification of Lymphoid Neoplasms" (REAL) classification, originally published by the International Lymphoma Study Group (ILSG) in 1994.

common risk factors and etiologies. For all these reasons, what have in the past commonly been referred to as non-Hodgkin's lymphomas, Hodgkin's lymphomas, and multiple myelomas are all related malignancies[18] which are appropriately evaluated together in assessing causality and etiology.

These diseases are also often grouped together in epidemiologic studies, not only because of their many

18. In the initial review of literature and assessment of the causal association between Agent Orange and malignant lymphomas, the Institute of Medicine recognized both the common features of these malignancies and the propriety for considering them together under the rubric of malignant lymphomas:

> The malignant lymphomas are a group of morphologically related neoplasms derived from lymphoreticular cells in lymph nodes, bone marrow, spleen, liver or other sites in the body such as the skin, intestine, and lung. The common stem cell origin in lymphoreticular tissue in lymph nodes and extranodular tissues underscores their unity despite a plethora of histologic and immunologic cell subtypes. Significant microscopic characteristics important for treatment and prognosis are the basis for separating the lymphomas into Hodgkin's disease (HD; ICD 201.0-201.9), non-Hodgkin's lymphomas (NHL: ICD-9 200.0-200.8, 202.0-202.2, 202.8-202.9), and multiple myeloma (MM; IC-9 203.0, 203.2-203.8).

Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides; Division of Health Promotion and Disease Prevention, Institute of Medicine, National Academy of Sciences, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (National Academy Press, Washington, D.C. 1994) at pp. 525-526.

commonalities, but because doing so is often necessary for such studies to achieve statistical power.[19]

A. The Epidemiology of Herbicide-Induced Non-Hodgkin's Lymphoma

Among the strongest causal associations for Agent Orange and disease is that for the collection of malignancies which were until recently classified as "non-Hodgkin's lymphomas." A causal association for non-Hodgkin's lymphoma was initially found by the Institute of Medicine in 1994,[20] was corroborated in its 1996 update,[21] was

19. Epidemiology is too insensitive an analytic tool to assess causality of the many subtypes of lymphomas recognized under the REAL and WHO classification systems, because the many cell subtypes are so rare that epidemiologic studies cannot be designed to study them and still have sufficient statistical power — which is critical for the scientific validity of any epidemiologic study. It is therefore not surprising that positive associations in multiple epidemiologic studies evaluating exposure to Agent Orange have been demonstrated for non-Hodgkin's lymphomas, Hodgkin's disease and multiple myeloma. Since multiple myeloma is a much rarer malignancy than Hodgkin's disease and the group of all other non-Hodgkin's lymphomas combined, it is also not surprising that odds ratios for multiple myeloma are increased similarly to these other disease categories, but that the results often do not achieve statistical significance for lack of sufficient statistical power to detect a significant increase in such a rare disease.

20. Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides; Division of Health Promotion and Disease Prevention, Institute of Medicine, National Academy of Sciences, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (National Academy Press, Washington, D.C. 1994).

21. Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides; Division of Health Promotion (Cont'd)

confirmed in its 1998 update,[22] and was reconfirmed in its 2000 update.[23]

The 2000 Update of the Institute of Medicine tabulated a total of 47 occupational cohort epidemiologic studies relevant to causality of non-Hodgkin's lymphoma from Agent Orange. Of these, 26 studies were first evaluated in the Institute's initial monograph, 12 studies were evaluated in the 1996 update, 7 studies were evaluated in the 1998 update, and 2 studies were evaluated in the 2000 update.[24] Since the 2000 update, at least three more occupational studies have been published.[25] Of these

(Cont'd)
and Disease Prevention, Institute of Medicine, National Academy of Sciences, *Veterans and Agent Orange: Update 1996* (National Academy Press, Washington, D.C. 1996).

22. Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides; Division of Health Promotion and Disease Prevention, Institute of Medicine, National Academy of Sciences, *Veterans and Agent Orange: Update 1998* (National Academy Press, Washington, D.C. 1999).

23. Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides; Division of Health Promotion and Disease Prevention, Institute of Medicine, National Academy of Sciences, *Veterans and Agent Orange: Update 2000* (National Academy Press, Washington, D.C. 2000).

24. Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides; Division of Health Promotion and Disease Prevention, Institute of Medicine, National Academy of Sciences, *Veterans and Agent Orange: Update 2000* (National Academy Press, Washington, D.C. 2000).

25. Thörn, Ä., et al., "Mortality and cancer incidence among Swedish lumberjacks exposed to phenoxy herbicides," *Occup. Environ.*
(Cont'd)

50 studies, all but three reported increased risks of non-Hodgkin's lymphoma among the exposed cohorts. In approximately 18 of the studies the increased risk of disease was statistically significant to a 95% confidence interval for non-Hodgkin's lymphoma. In none of the studies was a significant deficit of non-Hodgkin's lymphoma reported. Thus, the multiple occupational epidemiology studies regarding phenoxyacetic herbicides are quite consistent in demonstrating an increased risk of non-Hodgkin's lymphoma in workers exposed to these herbicides and, hence, Agent Orange. That more than one-third of the studies yielded significant positive results and no studies reported negative significant results is strong evidence that exposure to phenoxyacetic herbicides, Agent Orange, and dioxin, is causative of non-Hodgkin's lymphoma.

B. The Epidemiology of Herbicide-induced Multiple Myeloma

Multiple myeloma is cancer of plasma cells and is characterized by tumors of these cells in various bones of the body. Myeloma is a bone-destroying tumor. This cancer can (and often does) develop at the same time in many locations of the body (thus, multiple). Myeloma causes large areas of destruction of the bone. The tumor occurs most often in the ribs, vertebrae, pelvic bones, and flat bones of the skull. Intense pain and fractures are common.

(Cont'd)
Med. 57:718-720 (2000); Burns, C.J., et al., "Mortality in chemical workers potentially exposed to 2,4-dichloro-phenoxyacetic acid (2,4-D) 1945-94: an update," *Occup. Environ. Med.* 58:24-30 (2001); McDuffie, H., "Non-Hodgkin's Lymphoma and Specific Pesticide Exposures in Men: Cross-Canada Study of Pesticides and Health," *Cancer Epidemiology, Biomarkers & Prevention* 10:1155-1163 (2001).

In its initial evaluation of the epidemiologic literature, the Institute of Medicine found "limited/suggestive evidence" of an association between herbicide exposure and the development of multiple myeloma. In its summary regarding multiple myeloma, the Institute of Medicine wrote:

> Multiple myeloma has been less extensively studied than other lymphomas, but a consistent pattern of elevated risks appears in the studies that have been conducted. . . . Ten studies of agricultural and forestry workers provide information on MM risk in relation to herbicide or pesticide exposure. All demonstrated an odds ration or SMR greater than 1.0; seven did so at a statistically significant level. However, two did not demonstrate an increase over the odds ration for farming when specification of herbicide or pesticide use was added, and two demonstrated a relatively flat exposure-response relation. Such limitations in some studies are to be expected, however, given the small number of MM cases with herbicide exposure. The committee determined that the evidence for this association was limited/suggestive because the individuals in the existing studies — mostly farmers — have, by the nature of their occupation, probably been exposed to a range of potentially carcinogenic agents other than herbicides and TCDD.

Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides; Division of Health Promotion and Disease Prevention, Institute of Medicine, National Academy of Sciences, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (National Academy Press, Washington, D.C. 1994) at pp. 562-563.

However, the Institute of Medicine also noted that "[t]he finding of an association between exposure to phenoxy acids or TCDD and Hodgkin's disease and non-Hodgkin's lymphoma in humans strengthens the suggestive evidence for an association between multiple myeloma and exposure to phenoxy acids." *Id.* at 563.

In reviewing the conclusion of the Institute of Medicine, the Veterans Administration found the evidence concerning multiple myeloma convincing because (1) most of the studies reviewed by the Institute showed an increased (although in most cases nonsignificant) risk, and (2) multiple myeloma is closely related biologically to B-cell non-Hodgkin's lymphoma so that the epidemiological evidence concerning non-Hodgkin's lymphoma gives added weight to the association between herbicide exposure and multiple myeloma. Based on this clinical consideration and the weight of the epidemiological evidence, Secretary Brown concluded that there is a positive association between herbicide exposure and multiple myeloma that manifests itself to a degree of ten percent at any time after exposure.

The 2000 Update of the Institute of Medicine tabulated a total of 24 occupational cohort epidemiologic studies relevant to causality of multiple myeloma from Agent Orange. Of these, 12 studies were first evaluated in the Institute's initial monograph, 7 studies were evaluated in the 1996 update, 3 studies were evaluated in the 1998 update, and 2 studies were evaluated in the 2000 update.[26] Of the 24 studies

26. Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides; Division of Health Promotion and Disease Prevention, Institute of Medicine, National Academy of Sciences, *Veterans and Agent Orange: Update 2000* (National Academy Press, Washington, D.C. 2000).

in the 2000 Update, all but 2 reported increased risks of multiple myeloma disease among the exposed cohorts. In about half of the studies the increased risk of disease was statistically significant to a 95% confidence interval for multiple myeloma. In none of the studies was a significant deficit of multiple myeloma reported. Thus, the multiple occupational epidemiology studies regarding phenoxyacetic herbicides are consistent in demonstrating an increased risk of multiple myeloma in workers exposed to these herbicides and, hence, Agent Orange. That half the studies showed significant positive results and none reported negative significant results is strong evidence that exposure to phenoxyacetic herbicides and Agent Orange causes multiple myeloma.

Since multiple myeloma is a subtype of non-Hodgkin's lymphoma, since it along with certain non-Hodgkin's lymphomas has recently been reclassified by the International Agency for Research on Cancer as a mature B-cell neoplasm, since non-Hodgkin's lymphoma and Hodgkin's disease have been accepted as diseases caused by exposure to herbicides, since most epidemiologic studies lack sufficient statistical power to yield significant results for particular subtypes of cancers, it is now reasonable to conclude that a causal association does exist for exposure to phenoxy herbicides and multiple myeloma, as Secretary Brown concluded in reviewing the initial report of the Institute of Medicine.

CONCLUSION

Advances in medical science during the past twenty years have shown that the causal association between herbicide exposure and Non-Hodgkin's Lymphoma and Multiple Myeloma have proven to be genuine. Respondents, who suffer from these lymphoid malignancies, were not adequately represented in the class action, because no legal representative was appointed to represent their interests. Had a legal representative who was competent and had no conflicting interests been appointed to represent Respondents in the settlement, such a legal representative would have recognized that advances in medical science with the passage of time would only benefit future disease claimants such as Respondents, and, in the discharge of his or her fiduciary duty to this class of claimants, would have litigated vigorously to protect their interests and would have preserved their claims to be litigated in the future when their diseases manifested and, coincidentally, the science to prove the cause of their diseases was mature. Since Respondents' interests were not adequately represented in the class action settlement, the judgment of the Second Circuit should be affirmed.

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Lymphoma Foundation of America (LFA) is the national organization devoted solely to lymphoma patients and their families. LFA has a strong interest in the causes of lymphoma; it has conducted a survey of worldwide medical and scientific literature on the link between pesticides and lymphoma, and has published a research report titled *Do Pesticides Cause Lymphoma?* (Lymphoma Foundation of America 2001) which is available on the internet at http://www.lymphomahelp.org/docs/research/researchreport/introduction.pdf.

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In The

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DOW CHEMICAL COMPANY,
MONSANTO CHEMICAL, et al.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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INTEREST OF THE AMICI CURIAE

Amici are law professors who teach and write on the role of federal and state courts in class actions and thus have a strong and continuing interest in the development of the law in this field.

Amici hope to persuade this Court to retain the traditional rule that *every* absent class member is entitled to collateral review of the adequacy of representation accorded to him or her in a class action proceeding. We expect respondents to argue that ~~there are~~ many reasons, particular to this case, for the Court to hold that a collateral attack is permissible here, *e.g.*, special notice problems stemming from the future nature of these claims, and the absence of settlement funds from which to compensate the respondents. We recognize the force of those arguments. Indeed, it is because the circumstances here are so compelling that we write to emphasize the problems with a holding in this case that concentrates on the peculiarities of the respondents' situation. The right to collateral attack must be preserved for *all* absentees. We submit this brief to make that argument.

None of the amici has any financial or other similar interest in the outcome of this lawsuit or any suits raising similar issues. All of the parties have consented to the filing of this brief.[1]

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[1] This brief was not authored, in whole or in part, by counsel for any party. Other than the amici on whose behalf this brief is submitted, and their counsel, no person or entity made any monetary or other contribution to the preparation of this brief.

SUMMARY OF ARGUMENT

Petitioners sound an alarm: Beware of radical new law. We agree, but it is petitioners who argue for radical change and their plea should be rejected.

The traditional rule in this country has been, and is, that absent class members may collaterally challenge, and receive *de novo* review of, the adequacy of representation afforded them in a class action proceeding. This traditional rule flows from two time-honored principles: (1) under the Due Process Clause, adequacy of representation in fact, and at all times, is a prerequisite for a court's exercise of jurisdiction over absentees, and (2) a court lacks the authority conclusively to determine *for other courts* the *res judicata* effect of its judgments. Petitioners propose, in effect, the rejection of the traditional rule and hence the weakening of the two principles underlying that rule (and also underlying a substantial portion of our law of procedure unrelated to class actions).

The traditional rule is necessary to ensure that absentees receive minimally fair treatment in class action proceedings. As this Court and others have long recognized, there is a substantial risk of collusion between class counsel and defendants in class actions because class counsel has great control over the proceeding and counsel's interests are never perfectly aligned with the absent class. Because of the risk of collusion, even the most conscientious judge may lack the information necessary to ensure that the rights of absentees are secured. Objectors are unusual in class action proceedings, and even when they are present, they cannot be presumed to represent absentees adequately. In many cases their interests may be quite remote from substantial segments of the absent class, and no procedure exists, is followed, or would make

sense to ensure that objectors are "adequate" before their objections are entertained.

This Court's affirmance of the traditional rule will not unsettle class action practice as it currently exists. Plaintiffs' lawyers have little incentive to bring collateral actions except in very unusual cases, and defendants have ample incentive to settle class actions despite the possibility of a future collateral challenge. The proof is in the pudding: although absentees had the right to attack collaterally in all the federal circuits prior to 1997 and retain that right in all but one of the circuits since 1997, class actions have settled and continue to settle in almost all cases.

This Court should reject petitioners' plea to disturb settled law by the adoption of a rule barring collateral review. Rejection is required both in the interest of validating cherished principles of due process, and in the interest of avoiding the disruption of class action practice and other litigation practice as it has existed in this country for decades.[2]

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[2] This brief addresses the question whether the federal constitution requires that an absentee class member be allowed to attack collaterally the adequacy of representation in a class action that resulted in a settlement or other judgment. But in the event that this Court rejects our argument and determines that the existing rule on that question should be changed, we submit that, under this Court's decision in *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), the case should be remanded to the court below in order to determine (a) what preclusive effect would be given in such a case by a New York state court, and (b) whether that effect is inconsistent with any compelling federal interest.

ARGUMENT

I. What is New and What is Not: Petitioners Propose the Abandonment of Traditional Rules and Principles of Procedure

Petitioners and amici in support of petitioners argue that this Court should not adopt a novel approach to preclusion in class actions. We agree. The problem, however, is that petitioners and their amici would have this Court believe that it is respondents who advocate the new rule and petitioners who stand with precedent and tradition. That is false.

The state of the law is this: Until 1997, when the Ninth Circuit issued its decision in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999) [hereinafter *Epstein III*], the settled rule in every circuit in this country was that any absentee (nonparticipating) class member who was purportedly bound by any class action settlement could maintain suit on the underlying claims in a new action provided that she could show that she had not been adequately represented in the original action. *See e.g.*, *Wright, Miller & Cooper, Federal Practice and Procedure*, Section 4455, at 484-87 (2002) (describing *Epstein III*'s new approach and contrasting it unfavorably with the traditional approach allowing adequacy to be challenged in a collateral proceeding)[3]; *Newberg on Class Actions*,

[3] *Wright, Miller & Cooper* says this of *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997) [hereafter *Epstein II*], the panel opinion reversed by *Epstein III*:

> The initial panel opinion seemed surprising only by taking such great effort to reach conclusions that many students would have thought clearly required by long tradition. It has long been the general understanding that only adequate

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Section 1625, at 16-133, 16-137 (3rd ed. 1992) (explaining that Rule 23 "does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment" and that "[d]ue process of law would be violated for the class judgment" to be held binding "unless the court applying *res judicata* could conclude that the class was adequately represented in the first suit.").[4]

Moreover, putting aside for the moment legitimate questions about whether even the Ninth Circuit adheres to the rule announced by the panel in *Epstein III*[5] (a panel

> representation can justify preclusion against nonparticipating class members.
>
> *Wright, Miller & Cooper*, Section 4455, at 485.

[4] Petitioners maintain that when they agreed to pay $180 million in settlement they relied on their belief that no one, no absent class member, could ever obtain collateral review thereafter on the grounds that he or she had been inadequately represented. *Petitioners' Brief*, at 12. If petitioners so relied, they did so unreasonably. As of 1984, not a single circuit in this country had adopted the position that absent class members are precluded from seeking and obtaining collateral review based on inadequacy of representation. Indeed, the fact that petitioners inserted language into the settlement agreement to the effect that absent class members were forever barred from bringing any collateral actions, *see Petitioners' Brief*, at 17, suggests that petitioners themselves understood that the background legal regime did not bar such actions. Petitioners certainly should have understood that the settlement language by itself could do nothing to change the due process limits on binding absent class members in the absence of adequate representation. *See infra* Section III (discussing the possibility that the insertion of language in class action settlements purporting to bar future litigation is intended to mislead unsophisticated class members).

[5] *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 853-58 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1247 (denying preclusion in part because absent class members were not adequately represented in original action).

that was reversing itself),[6] absent class members elsewhere in the country remain free to attack collaterally the adequacy of representation they received in the original class action proceeding. Yes, a few panels in a few circuits seem somewhat positively inclined toward the *Epstein III* position, but thus far we know of no other circuit that has adopted the position on collateral attack of adequacy articulated in *Epstein III*, a position petitioners now ask this Court to adopt.[7]

The notion that a legal principle universally accepted before 1997 and all but universally accepted today is "new," and would result in the end of class action settlement practice as we know it, is, quite simply,

[6] The panel's first opinion, holding that the plaintiffs were inadequately represented and thus not bound by the settlement in the original class action proceeding, was written by Judge Norris and joined by Judge Wiggins. Judge O'Scannlain dissented. Two days after the decision was entered Judge Norris retired from the bench. Two weeks later the defendants filed a petition for rehearing. Judge Thomas replaced Judge Norris on the panel. The reconstituted panel granted the rehearing petition and a year and a half after the first opinion, the view expressed by Judge O'Scannlain in dissent was adopted by a new two person majority: Judge O'Scannlain himself and Judge Wiggins, who apparently had changed his mind. Judge Thomas, the new member of the panel, dissented. Thus, putting aside Judge Wiggins' two votes as cancelling themselves out, one judge, Judge O'Scannlain, voted for the no collateral attack of adequacy rule, and two judges of the Ninth Circuit voted against it. *See Wright, Miller & Cooper*, Section 4455, at 479 (detailing this history).

[7] For an excellent overview of this area of law, and a powerful argument against *Epstein III*, see Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation In Class Suits*, 79 TEX. L. REV. 383 (2000). For an earlier, forceful defense of the absentee's right to bring a collateral attack, see Henry Paul Monaghan, *Antitrust Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998).

incomprehensible. Petitioners' and amici's doomsday scenarios about the practical effect of allowing absent class members to attack adequacy in collateral proceedings are premised on the false claim that we have been living in a world where absent class members had no such right. When that misleading notion is stripped away, we are left with the following truths: Class actions almost always settle,[8] and that phenomenon did not begin after *Epstein III*.

Indeed, there is no evidence that we know of to suggest that the settlement rate went up after *Epstein III*, a fact that is not surprising given how little room there was for an increase. Nor is there any evidence that the availability of collateral review of adequacy of representation throughout this country has ever resulted in a heavy caseload of collateral review litigation in any court. The rate of class action settlements is not going to drop, and the incidence of collateral litigation is not going to skyrocket, upon a ruling by this Court affirming what has long been the law. Once those truths are understood, there is precious little force left in petitioner's arguments, other than the misleading claim that deference is due the no-collateral-attack position because it is time-honored, which, as we have explained, it is not.

[8] *See, e.g.*, Thomas E. Willging, et al., *Empirical Study of Class Actions in Four Federal Districts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center 1996) (reporting high settlement rates in class actions in all four of the federal districts included in the study), at 60; George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEG. STUD. 521 (1997) (observing that "virtually every mass tort action that has been successfully certified has settled out of court").

We, on the other hand, do not believe that the primary reason for this Court to leave the law as it has been for decades is that it has been that way for decades. Nor do we believe that the primary reason to leave the law as it has been is that it has not interfered to date with the settlement of class actions. Rather, the primary reason for this Court to affirm the traditional position on the right of an absentee class member to challenge adequacy in a collateral proceeding is that the well-established rule is correct. It is woven into the fabric of due process so tightly that pulling this one string out will mar the cloth in a manner that cannot be repaired without first pulling out a sizable number of related strings. Unless this Court is prepared to risk unraveling a major part of its due process jurisprudence, it should reject petitioners' invitation to throw out or substantially restrict the right of absent class members to challenge adequacy through a collateral attack.

II. The Rule Allowing Collateral Attack by an Absentee on the Adequacy of Representation is an Expression of the Central Tenet of Due Process that All Persons and Entities Are Free to Ignore the Judgments of Courts that Lack Legitimate Power over Them

This is a case about the power of courts to bind people to their judgments or as lawyers put it: it is a case about jurisdiction. More precisely, it is a case about the constitutional limits of legitimate jurisdiction under the Due Process Clause of the Fifth Amendment (and by extension the corollary clause in the Fourteenth). Although Justice Stone did not use the word jurisdiction in describing the Court's holding in *Hansberry v. Lee*, 311 U.S. 32 (1940), that the Due Process Clause had been violated, the

opinion he authored makes it clear that the limits of legitimate jurisdiction lay at the heart of the case:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U.S. 714 [1871]. . . .
>
> To [that] general rule[] there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.

Id. at 40.

What perfects a court's jurisdiction over absentees? Petitioners, following the panel in *Epstein III*, appear fixated on the following language from *Hansberry*: "[T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." *Id.* at 40-42 (1940). From there, petitioners and their amici leap to their assertion that Rule 23's "procedures," not present when *Hansberry* was decided (most notably the requirement that the first court make a finding on the adequacy of representation), meet what they treat as Justice Stone's any-fair-procedure test.[9]

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[9] We have clipped off the beginning of Justice Stone's sentence in our last quote from *Hansberry* because we do not rest our argument upon it. But it is worth noting what it states: "With a proper regard for

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But Justice Stone did not lay out an any-fair-procedure test. He identified one procedural protection – adequacy of representation – as sufficient to satisfy the demands of the Due Process Clause:

> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment *where they are in fact adequately represented* by parties who are present, or where they actually participate in the conduct of the litigation, *Plumb v. Goodnow's Administrator*, 123 U.S. 560 [1887]; *Confectioners' Machinery Co. v. Racine Engine & Mach. Co.*, 163 F. 914 [1908]; *Bryant Electric Co. v. Marshall*, 169 F. 426 [1909]. . . .
>
> In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit. *See Bernheimer v. Converse*, 206 U.S. 516 [1907]; *Marin v. Augedahl*, 247 U.S. 142 [1918]; *Chandler v. Peketz*, 297 U.S. 609 [1936].

Id. at 43 (emphasis added).

Two points in this passage deserve note. First, the rule binding people who were "in fact" adequately represented in the first court was "familiar" in the federal courts long before *Hansberry*; second, being adequately represented in fact was what Justice Stone meant by "such procedure." That is, adequacy of representation is the procedural protection that allows a court to bind absentees. Petitioners would have this Court substitute *a procedure for finding adequacy* for the *procedure of adequate representation* that Justice Stone described. There is no precedent for that substitution.

The idea that due process demands the adequate representation in fact of absent class members for the class action court to have jurisdiction over them is echoed in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). In *Shutts*, the Court did not hold, as petitioners suggest, that the Due Process Clause requires a procedure for the finding of adequacy in the original proceeding. Instead, the Court held that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of absent class members." *Id.* at 812. The "at all times" language of the Court in *Shutts* makes no sense whatsoever under petitioners' view of the Due Process Clause because it cannot be ascertained whether absentees were adequately represented "at all times" until after the original proceeding, including any appeal, has been

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divergent local institutions and interests, this Court is justified in saying that there has been a failure of due process only. . . . " Thus, one could argue that if Justice Stone had laid down an any-fair-procedures test, that approach was driven by respect for our federalist system and would not be appropriate when interpreting the Due Process Clause contained in the Fifth Amendment as opposed to the Fourteenth, which was at issue in *Hansberry*. But because we do not believe Justice Stone's opinion supports such an interpretation with respect to any court, state or federal, we follow petitioners' truncated presentation of the "procedures" point.

completed.[10] In addition, the "at all times" language is inconsistent with the notion that a procedure for finding adequacy can be substituted for adequacy *in fact*.

To be sure, the particular issue before the Court in *Shutts* was whether a court in one state may exercise jurisdiction over absent class members from other states who otherwise lack any connection to the forum state, and it was in that setting that the Court held that due process forbids the exercise of such jurisdiction without adequate representation and notice (and, at least in some class actions, a right to opt-out). Nonetheless, it is significant that federal courts (including the Second Circuit in the direct appeal taken by objectors to the original settlement in this case, *In re Agent Orange Products Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988)), consistently take for granted that their jurisdiction over absentees (whether within or without the federal court's usual geographical reach) is dependent on the factors detailed in *Shutts*. Even the dueling *Epstein* panels in the Ninth Circuit share the understanding that *Shutts* applies to all absentees.[11] *Devlin* undercuts, rather than

[10] Most recently, in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), this Court reaffirmed the "constitutional requirement" that "the named plaintiff at all times adequately represent the interests of the absent class members." *Id.* at 846 n. 24 (quoting *Hansberry* and *Shutts*).

[11] Petitioners wrongly maintain that *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), and *Devlin v. Scardelletti*, 122 S.Ct. 2005 (2002) – support their view that the Due Process Clause does not afford absentees a right to seek collateral review of the adequacy of representation in the original proceeding. This Court in *Matsushita* specifically disavowed consideration of that issue. *See Matsushita*, 516 U.S. at 378 n. 5 (explaining that although "respondents contend that the settlement proceedings did not satisfy due process because the class was inadequately represented. . . . We need not address that issue . . . because it

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supports, petitioners' argument. The majority in *Devlin* held that class members who are not named in the complaint may appeal only if they objected to the proposed judgment, and even then only to the extent their appeal relates to their objections; all other class members not named in the complaint are regarded as non-parties for purposes of appeal and cannot appeal as of right. 122 S. Ct. at 2012-13. Justice Scalia's dissent, joined by Justices Kennedy and Thomas, adopts an even narrower view of what constitutes a party for purpose of appeal in a class action; ". . . . only members of a class who are . . . named in the complaint are the class representatives . . . it is only these members of the class, and those who intervene or otherwise enter through third-party practice, who are parties to the class judgement." *Id.* at 2013 (Scalia, J., dissenting). Thus, to the extent *Devlin* bears on the issue of collateral review of adequacy of representation in class action lawsuits, both the majority and dissent suggest that at a minimum absent class members who did not appear in the original proceeding as objectors are non-parties to a class judgment, and hence are *not* precluded from seeking and obtaining collateral review. *See Epstein II*, 126 F.3d at 1241-42; *Epstein III*, 179 F.3d at 648. That assumption is correct because *Hansberry*, as we have just explained, is a case about the constitutional limits of jurisdiction over

is outside the scope of the question presented in this Court"); 516 U.S. at 399 (Ginsburg, J., concurring in part and dissenting in part) (emphasizing that the Court could not address adequacy of representation issues because "this is a Court of final and not first review," explaining that arguments concerning adequacy of representation "remain open for airing on remand," and affirming "the centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement.").

absentees, regardless of whether they are otherwise within a court's legitimate geographical reach.[12]

Most important, however, is that *Hansberry*'s reasoning on jurisdiction remains as right today as it was when written. The exercise of jurisdiction over absentees, represented in court by substitutes whom they did not choose and over whom they exercise no control, can be reconciled with time-honored notions of due process only if those representatives are adequate.[13] We do not understand anything in the briefs of petitioners or of their amici to contest that proposition. They simply don't say that jurisdiction is at stake. And for good reason.

Once the question at the heart of this case is understood to be a question of jurisdiction to bind absent class members, it becomes easy to understand why the traditional rule allowing collateral attack has stood for so long. There is perhaps no more fundamental precept of American law than that a court may not conclusively determine its own jurisdiction. That means that one who contests jurisdiction need not appear in the first court to make her plea and that an appeal by another from the first court's judgment does not bind one who has chosen not to appear.[14] *See Martin v. Wilks*, 490 U.S. 755, 762 (1989).

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[12] After all, the absentees in *Hansberry* were presumably otherwise subject to the geographical reach of the Illinois state court that purported to bind them.

[13] Put another way, adequacy is analogous (for all absentees regardless of geographical residence or other connections to a particular court's home base) to the requirement of minimum contacts as a basis for a court's jurisdiction over a defendant, a point we develop more fully below.

[14] Petitioners and their amici suggest that the presence and participation of objectors in a class action proceeding somehow can cure

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Finally, in examining the jurisdiction of the first court, the second court (where the contestor makes her claim) proceeds *de novo*.

The same tried and true procedural rules have always been and should remain applicable to absent class members. As *Shutts* puts it, absentees may "sit back and allow the litigation to run its course. . . ." *Shutts*, 472 U.S. at 810. Indeed, requiring absent class members to show up to contest anything in the first proceeding approaches an oxymoron. Class actions are designed for those instances when there are too many people to make joinder feasible. Yet, this Court is asked to adopt a rule requiring absentees to show up or forever hold their peace. It is not surprising that, as *Wright, Miller & Cooper* put it, a law student could be expected to get right a rule that *Epstein III* gets wrong,[15] and yet it is the approach of *Epstein III* that petitioners want this Court to embrace.

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the jurisdictional defect of inadequate representation in fact. But absent class members do not select, control or typically ever even know of the existence of objectors, and the objectors are not under even a nominal obligation to attempt to represent any absentees. How then can the presence of objectors, even a number of them, undo the failures of those charged with adequately representing absentees – that is, class counsel and class representatives? Petitioner's objectors-as-cure argument not only lacks any logical foundation but also flies in the face of what we know as an empirical matter about objectors – that too often their only goal is to be paid off to go away. *See infra* Section III (discussing the lack of incentives for objectors to mount serious objections to proposed settlements).

[15] *See Wright, Miller & Cooper*, Section 4455, at 485 ("The initial panel opinion [*Epstein II*] seemed surprising only by taking such great effort to reach conclusions that many students would have thought clearly required by long tradition.").

We have said that pulling on this thread would risk unraveling important sections of the fabric of due process. We mean foundational principles that describe a court's authority to bind absentees, outside the class action context. If, as we submit, adequacy of representation is a prerequisite to the jurisdiction of a court to bind an absent class member, to rule here that an absentee's challenge to jurisdiction may be conducted only in the original court (or, almost the same thing, that the second court may not determine the matter *de novo*), would suggest to other litigants and courts that similar exceptions will be made to the longstanding rule that any court judgment entered against an absentee without proper jurisdiction may be ignored.

Disturbing the understanding of how jurisdiction is contested would entail real costs, as opposed to the imaginary costs petitioners ascribe to what they mislabel as a "new" rule permitting collateral review. Just consider the increased costs for class action proceedings themselves. Absent class members (a category that today must embrace almost every American in at least one case) would have to monitor with care at least those class actions in which they have a significant stake, and the number of such actions is on the rise as courts continue to experiment with class actions as a means of resolving "mass torts." They would have to hire counsel, perhaps travel to distant courts, and object (just in case) in order to preserve their right to appeal should anything go wrong. *See Devlin*, 122 S. Ct. at 2012-13. Class action proceedings would be slower and more cumbersome as a result.

And then the question would arise, who and what comes next? Defendants, corporations and individuals alike, are now free to weigh the risks of not participating

in a proceeding in some faraway court with dubious claims to the exercise of legitimate power over them against the costs and the risks of challenging jurisdiction in that court. If this Court were to adopt petitioners' radically new rule, defendants would have to fear that this Court again might jettison foundational law and hold that they too should have shown up in the initial forum to contest jurisdiction. And then defendants, like absent class members, would be compelled to bear far greater litigation expenses and inconvenience than they currently do.

Moreover, if this Court demonstrates a willingness to jettison the foundation of what is necessary for the exercise of legitimate jurisdiction in this area, *i.e.*, adequate representation, then it is unclear why anyone should regard the other bases for the exercise of legitimate jurisdiction as secure. Why not jettison "minimum contacts" as a prerequisite for the exercise of personal jurisdiction over a defendant? If notice without more is enough to confer jurisdiction over absent class members, why should notice without more be insufficient to exercise jurisdiction over any defendant? If anything, notice should carry more weight, in jurisdictional terms, in the case of defendant corporations entitled to actual notice and equipped with lawyers to interpret that notice, than in the case of absentee class members who often "receive" as notice nothing more than largely incomprehensible television and radio announcements.

Consider, also, the likely consequences of this Court's acceptance of petitioners' argument that a procedure for establishing adequacy in the first court should stop all further inquiry into the matter. Is this Court then prepared to rule, as it almost certainly would be asked to do, that a procedure for determining minimum contacts (when

proceed *de novo*? We hasten to add that we are not suggesting that the Court jettison *International Shoe v. State of Washington,* 326 U.S. 310 (1945); rather, we seek to demonstrate just how disruptive petitioners' position might prove to be if this Court were to adopt it.

It is impossible to say precisely what petitioners and their amici would have this Court hold to be sufficient for the legitimate exercise of jurisdiction over absent class members. From what we can glean from their briefs, their two principal options seem to be: 1) notice (whether with or without an opportunity to opt-out, a point not clear to us from petitioners' and their amici's briefs); and/or 2) a procedure for determining adequacy.[16] As to notice by itself, we have already suggested why that option is less than coherent as a substitute for adequacy. Moreover, the notice issues in this case, which we do not address, constitute simply an extreme version of the general truth that class action notices cannot easily be equated to notice of an individual action: Individual notice of a lawsuit is rarely treated as junk mail. As for holding that a *procedure* for determining a jurisdictional prerequisite can substitute for the prerequisite itself, we have already indicated how that might disrupt settled jurisdictional understandings of the rights of absent defendants and alluded to the lack of

[16] Petitioners arguably suggest a third alternative: the presence of a court obliged to sit as guardian for the class. In other words, they seem to argue that Rule 23's requirement that class settlements must be approved by a judge is a viable substitute for adequacy of representation in fact. This is, in essence, an argument that the presence of a court, at least one charged to look out for the rights of absentees, gives that court legitimate jurisdiction. There is absolutely no basis in precedent or reason for such an evisceration of the concept of jurisdiction.

precedent for such a substitution. Most important, to substitute a procedural snapshot of a particular moment in time – a time before the proceeding has concluded – would represent a significant curtailment of the right heretofore guaranteed: adequacy throughout the proceeding.

Rather than acknowledging that the issue here is one of a court's jurisdiction to bind an absentee, petitioners present this case as if it involved some much more generalized question of due process, which this Court can make up as it goes along, using the open-ended balancing test outlined in *Matthews v. Eldridge*, 424 U.S. 147 (1979). But this Court has recently said that *Matthews* is not the appropriate test for procedural questions that this Court has traditionally analyzed through more directly relevant precedents. *See Dusenberry v. United States*, 122 S.Ct. 694, 699 (2002).

Adequacy of representation is the bedrock guarantee provided all absent class members in every form of class action in every court, federal and state. It has not just been the rule for a long time: it is the only explanation that is consistent with basic understandings of procedural justice that underlie much of this Court's Due Process Clause jurisprudence. But once one accepts that adequacy is the lynchpin of the constitutional exercise of jurisdiction – a reading consistent with all the provisions of Rule 23 as well as that rule's historical foundations and the arguments made at the time it was adopted, the adoption of any one of petitioners' positions might well amount to an unintended earthquake in procedural law. As Charles Wright has observed, Rule 23 "does not say" that all members of the class will be bound and recognizes "that a court conducting an action cannot predetermine its *res*

judicata effect, and that this can be tested only in a subsequent action. It recognizes too, that even a party named in the judgment will not be bound if he has been denied due process of law." Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 181 (1970). Moreover, there is no reason to risk such disruption because there is simply no basis, however exercised petitioners and their amici may be, to worry about leaving the law as it is.

III. The Existing Law on Collateral Attack is in Harmony with the Real World; Petitioner's Proposals Are at War with It

It is, we submit, self-evident that adherence to the traditional rule will not harm or even disturb the world of class action litigation. But, given the vehemence of petitioners' claims, we elaborate the point in this section.

Absent class members have always been allowed to ward off the defense of *res judicata* on the ground that they were not adequately represented. Although petitioners and amici argue that rational defendants would not settle (or not settle often) in a world in which collateral attack is available, they almost always do. After all, if a case does not settle, it will go to trial and judgment, and judgments are as subject to collateral attack for lack of adequacy as are settlements.

What then accounts for the alarm raised by the many corporations and business associations appearing in this case as amici? Perhaps they fear that the Second Circuit's opinion, or an opinion by this Court affirming settled law, would change the status quo by making plain a right that absent class members might now not be aware they possess. Notice that the petitioners admit, indeed try to use to their advantage, the fact that the settlement here

contained explicit language purporting to negate the availability of collateral attack. We are not surprised that such language was used because we believe, in light of our experience, that class notices often contain, sometimes in bold lettering, sentences telling the absent class members that failing to opt-out, or to object to a settlement, within the specified time will mean that they are forever barred from bringing any action in any court relating to the matters covered by the settlement.[17] Until and unless this Court rules otherwise, those statements are false, but perhaps defendants believe that these misstatements of law account for the rarity of collateral attacks.

In our view, however, the rarity of collateral challenges to class actions has little to do with misstatements of law contained in class notices, however ethically troubling those misstatements may be. Most collateral challenges to class action judgments or settlements – and certainly all challenges involving small individual claims – would take the form of a second class action that would be driven, for all practical purposes, by plaintiffs' lawyers,

[17] For example, consider the following language in a notice used in a recent class action against BaxterHealthcare involving persons who allegedly received contaminated blood plasma: "If the Court grants final certification of the settlement class and final approval of the Settlement Agreement, a final judgment shall be entered . . . forever barring every settlement class member . . . from prosecuting any past, present or future, known or unknown claim or lawsuit against Baxter. . . . " *See* Notice of Class Action Settlement in *In re Baxter Healthcare Corporation Gammagard Products Liablity Litigation* (C. D. Cal.), posted at http://www.aboblood.com/taint-settle.html.

and they would be extremely unlikely to be deceived by misstatements of law in class action notices.[18]

Therefore, something else accounts for the fact that one does not find and will not find plaintiffs' lawyers bringing frequent second class action suits on the ground that adequate representation was lacking in the first class action: The chance of persuading the second court (not an appeals court, but another trial level court) to say that the first court erred is exceedingly slim, even when the second court is proceeding *de novo*. Trial judges are naturally, and in most cases appropriately, reluctant to hold that another trial judge made such an error. More to the point, lawyers know that. Thus, there is little incentive for a plaintiff's lawyer (working almost always for a contingent fee) to bring a collateral attack. Moreover, to the extent that some plaintiffs' lawyers are interested only in seeking a quick payoff from class counsel and defense counsel as a *quid pro quo* for dropping nuisance or "strike suit"-type claims, those lawyers already have a ready means of doing so – *i.e.*, presenting or threatening to present objections in the class action proceeding itself.[19]

[18] Individuals with large individual claims might bring individual actions after a class action settlement, but plaintiffs' lawyers will surely also recognize the misstatements of law in class action notices.

[19] As the Advisory Committee's Comments to its latest proposals for amending Rule 23 stress, some objectors' primary purpose is to induce class counsel and defendants to reach a separate accord with them to make them go away. *See Excerpt of the Report of the Advisory Committee on Civil Rules, May 1, 2002*, posted at http:/www.uscourts.gov/rules/supct202.html. (explaining that "objections, which purport to represent class-wide interests . . . may augment the opportunity for obstruction and delay."). Even though objections to a class settlement are unlikely to scuttle the settlement altogether, the risk is

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If we are right, why are so many defendants and potential defendants pushing so hard for a rule that would "cure" a problem that does not exist – namely, a plethora of bogus collateral attack suits? There are two plausible answers. First, litigants pursue finality as an end in itself. Indeed, the reason defendants have embraced class action settlements as a means of resolving "mass tort" cases is that they provide a path around one-way preclusion, a legal precept that prevents defendants from using a victory in one individual law suit to bar suits by all those similarly injured. Class actions function as an important escape route, albeit a non-absolute one, from the effects of nonmutual preclusion. Petitioners and their amici want that escape route to be absolute. But to get there they need this Court to say: Although (in the absence of a relationship of privity) one individual pursuing a case with vigor can never bind another,[20] no matter how similar their two cases, a class action plaintiff and her lawyer – even with every incentive to settle on the cheap – can bind an entire group of people, even if *in fact*, as *Hansberry* puts it, adequate representation was lacking.

The second plausible reason for urging this Court to adopt an absolute rule is much less attractive, but all too real: The new rule would facilitate egregious collusion between class counsel and defendants. Consider what

too great for class counsel and the defendants to take: if the settlement is rejected by the court, every class member will be free immediately to sue individually (in a large stakes case), and every plaintiff's lawyer will be free immediately to file new class actions (in cases where the stakes are too small for individual suits).

[20] *See Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167 (1999).

happens in those rare cases when a trial or appellate court rejects a settlement on the basis of collusion or some other ground for determining that representation was inadequate. The parties can go to another trial court, change a term or two, although that is not technically necessary, and ask the second court to accept the deal.[21] One important, though hardly perfect, deterrent to such behavior is the prospect of *de novo* review by a second court in a collateral attack. *De novo* review avoids the unacceptable result that the last court's "adequacy of representation" finding will supersede the findings of inadequacy by the earlier courts. Thus, the availability of *de novo* review of adequacy of representation makes it less worthwhile for litigants to shop collusive settlements.

Moreover, settlement shopping is not the only way to obtain court approval for a collusive deal.[22] If, for example, counsel for an objecting member of the class succeeds in

[21] In *Zogofros v. Qwest Communications*, 225 F. Supp. 1217, 1223-24 (D. Oregon 2002), for example, the court concluded that class counsel and defendants "at some point, became unhappy that the court would not rush approval of their proposed settlement, but instead intended to carefully consider and thoroughly scrutinize it" and hence "abruptly remov[ed] themselves from the Chicago District Court's jurisdiction to start anew in Portland. . . . " Similarly, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 134 F.3d 133, 137 (3d Cir. 1998), after the Third Circuit set aside a class action settlement, "the parties repaired to the 18th Judicial District for the Parish of Iberville, Louisiana, where a similar suit had been pending, restructured their deal, and submitted it to the Louisiana court, which ultimately approved it."

[22] For a fuller discussion of practices discussed in this paragraph, see Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1104-1112 (1996); *see also* Katherine Ikedam, *Silencing The Objectors*, 15 GEO. J. LEGAL ETHICS 177, 180 (2001).

persuading the court to reject a settlement on grounds of inadequate representation (or indeed, on any grounds), there will be no fund from which that counsel can recover fees. Thus, most objectors are careful to avoid pushing too hard arguments that might completely scuttle the settlement. This is yet another reason it makes no sense to hold that the presence of objectors somehow suffices to eliminate the rights of all absentees to attack the settlement collaterally. More to the point, no one shows up to object in most class actions.[23] In sum then, with or without objectors, the first court's decision on adequacy is highly unlikely to be based on clashing presentations by true adversaries. Indeed, even those objectors dedicated to the presentation of serious objections – even those willing, if necessary, to scuttle the entire deal – are severely limited in their effectiveness because most courts either deny them discovery altogether or sharply restrict it.

Thus, in the real world *de novo* review makes perfect sense. The second court cannot be confident that the first court had the necessary information before it in rendering its findings on adequacy. It is the second court, not the first, that is more likely to hear that clash of positions deemed central in our system to reliable court rulings. A fairness hearing on a proposed class settlement may consist of nothing more than a rehearsed joint presentation by class counsel and defense counsel. In Judge Easterbrook's words, "[r]epresentative plaintiffs and their lawyers may be imperfect agents of other class members –

[23] *See* Thomas E. Willging, et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenge*, 71 N.Y.U. L. REV. 74, 140 (1996) (concluding that there were no objectors in 42 to 64 percent of the fairness hearings in four federal judicial districts).

may even put one over on the court, in a staged performance.... The court can't vindicate the class's rights because the friendly performance means that it lacks essential information." *Kamilewicz v. Bank Boston Corp.*, 100 F.3d 1348, 1352 (1996) (dissenting from denial of rehearing on banc). Given the realities of class action practice, *de novo* review by the second court is essential to give meaning to the due process requirement of adequate representation in fact. To change existing law and adopt a standard of high deference to the first court would be to adopt a rule that presumes a world that does not exist.

IV. Petitioners Rely on Analogies That Make No Sense

Petitioners rely on several analogies that make no sense. But because petitioners emphasize the importance of these analogies, we think it important to address them, albeit briefly.

Most notably, in arguing against *de novo* review of the adequacy of representation provided in the original proceeding, petitioners rely on an entirely unconvincing analogy between class action practice and habeas corpus proceedings attacking criminal convictions. In a criminal case, the defendant is keenly aware of the fact that a court has purported to exercise power over her. The criminal defendant is present at all important junctures of the case; she is provided with counsel if she cannot afford her own; and she has the opportunity to contest the original court's exercise of power over her on direct appeal. The relation of the absentee class member to the original litigation could not be more different.

Second, petitioners invoke *Teague v. Lane*, 489 U.S. 288, 295 (1989), and its progeny to try to ward off the

holdings regarding inadequacy of representation in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 597 U.S. 815 (1999). *Teague* is inapplicable here, even if (as is not the case) the habeas analogy made sense. *Teague* is inapplicable because neither *Amchem* nor *Ortiz* explicitly or even implicitly overrules any precedent of this Court.[24] The federalism concerns that underlie *Teague*, moreover, have nothing to do with this case. Finally, *Teague* is inapplicable because even if *Amchem* and *Ortiz*'s lessons about subclassing somehow could be seen as akin to new requirements for state authorities to follow in criminal cases, those "new" lessons would speak only to whether the representation here was adequate, not whether adequacy can be challenged in a collateral attack.[25]

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[24] Nothing in the language of either case suggests that the Court understood itself to be breaking, substantially or otherwise, with existing precedent, no less existing constitutional rules. Quite the contrary, both opinions are expressly grounded in language contained in Rule 23 that was already in place well before the Agent Orange litigation commenced.

[25] Notice, however, that petitioners worry about *Amchem* and *Ortiz* because they want this Court to accept that the representation in this case was adequate when this class action was originally determined. We mention that here because time and again petitioners' brief and that of their amici conflate the question of whether collateral attack should be available to absent class members with the question of whether these respondents were ever adequately represented in fact. The two questions must be kept apart. Petitioners encourage this Court to make new procedural law by delving into the merits of adequacy here throughout their brief. Even their discussion of the ill-cited *Matthews* balancing test roams back and forth between an *ad hoc* balancing of the interests at stake in this litigation and the more generalized balancing *Matthews* actually contemplates, assuming that case were relevant here. We do not base any of our argument on the inadequacy of representation in this particular case (or the notice problems here or

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Finally, in arguing that respondents were adequately represented in the original proceedings before Judge Weinstein, petitioners draw an analogy between the relief afforded to respondents in this case and a kind of "term insurance policy." *See Petitioners' Brief*, at 37. Of course, as petitioners themselves recognize, the question of adequacy of representation is distinct from the question of whether the settlement was fair. Nonetheless, as petitioners also recognize, at least implicitly, if one's representative settles one's claim for nothing of value, legitimate questions about adequacy are raised. They thus seek to convince this Court that something was provided. Again, that is irrelevant to whether respondents should be allowed to argue in a separate proceeding that the representation they received was inadequate. But, as petitioners push the "insurance policy point," we respond that doing so only embarrasses their other references to "rationality." No rational consumer would buy "term insurance" of the sort petitioners describe. The settlement established a compensation fund from which distributions began in 1988. No persons who became ill after December 31, 1994, were entitled to any recovery from the fund. (Adding insult to injury, persons

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the question of "futures" as particularly disabled absentees). That is not because we think the representation here was adequate or the notice acceptable or the inclusion of futures without subclassing consistent with Rule 23. We have grave doubts about all of that as the next paragraph in our text demonstrates, and we assume respondents will include in their arguments the contention that, at the very least, people similarly situated to themselves should be allowed the right to attack collaterally. We submit that such a holding would be too narrow, however, and have filed this brief in order to show that the right to attack collaterally must be preserved for all absentees without regard to the special circumstances present in the particular case.

who became ill before December 31, 1994, were entitled to recovery from the fund, but only if money happened to be left in the fund when they became ill, and no provision of the settlement was designed to ensure that a significant amount of money remained in the fund until December 31, 1994.) One would have to be quite irrational to buy any such "insurance" or to even understand such a deal as "insurance." Thus, the case in which petitioners argue that adequacy can be successfully assured by the initial court could not be weaker for that argument – a fact that may explain why they so desperately seek this Court to change the existing law entitling absentees to collateral review.

CONCLUSION

For the foregoing reasons, we urge that the traditional rule permitting collateral review of adequacy of representation at the instance of any absent class member be maintained, and that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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